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No. 230

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1910.

AMERICAN LAND COMPANY
(a corporation),
Complainant and Appellant,
vs.
LOUIS ZEISS,
Defendant and Appellee.

BRIEF FOR APPELLANT.

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Filed this.....*day of September, 1910.*

JAMES H. McKENNEY, Clerk.

By.....*Deputy Clerk.*

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Summary of Argument and Index will be found at page 12

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Statement of Facts.

In April, 1906, the public records of San Francisco were, in great part, destroyed by the fire which nearly wiped out the city. A special session of the Legislature was called soon afterwards at which, among other legislation which may be designated as "emergency" legislation, an act familiarly known as the "McEnerney Act", was passed

"to provide for the establishment and quieting of title to real property in case of the loss or destruction of public records".

The question presented to this court for its advice by the Circuit Court of Appeals arises under this act.

The bill of complaint alleges that on April 10, 1908, and for a long time prior thereto, the complainant's grantors were the owners of the fee of the land therein described, the title to which, at the time of filing the bill, had become vested in the complainant; that in March, 1851, while the State of California was still their owner, it granted to the City of San Francisco a lease of the lands in controversy, for the term of ninety-nine years (Stat. 1851, p. 764), which lease, in its unexpired portion ending in March, 1950, belonged to the respondent, appellee herein; that appellee, though owning no other interest and being entitled only to the possession for the period named, now claims to be the owner in fee by virtue of an alleged "decree", obtained by him in December, 1906, in an "action" brought by him, under the sanction of the act above referred to, entitled

Louis Zeiss v. All persons claiming any interest in or lien upon the real property herein described or any part thereof.

The act in question, in section 1, authorizes any person claiming an estate in lands who is in possession by himself or tenant to "maintain an action *in rem* against all the world" in the Superior Court of the county, "to es- " tablish his title to such property and to determine all " adverse claims thereto. Any number of parcels of

" land may be included in the same action". In section 2, the act provides for the filing of a verified complaint by such person describing himself as plaintiff and designating the defendants to be "all persons claiming any " interest in or lien upon the property hereinafter de- " scribed, or any part thereof". Such complaint shall contain allegations showing the fact of the loss of the records, the description of the property and the estate and possession in it claimed by the plaintiff.

In the case referred to, the complaint stated nothing beyond the facts required by the statute, except a prayer that the plaintiff's title be established as alleged. *Plaintiff did not allege that anybody controverted or questioned or threatened his alleged right as owner of the fee of the lands, nor was any individual designated as a party defendant.*

Section 5 of the act requires that the plaintiff, contemporaneously with the filing of the complaint, file an affidavit, setting forth the character of his estate and possession, the duration of its existence and from whom obtained; whether or not he has made any conveyance of his interest, or any part of it, and if so, when and to whom; a statement of subsisting mortgages and liens; " that he does not know and has never been informed of " any other person who claims or who may claim, any " interest in or lien upon the property or any part " thereof, adversely to him, or, if he does know, then the " name and address of such person. If the plaintiff is " unable to state any one or more of the matters herein

" required, he shall set forth and show, fully and explic-
" itly, the reasons for such inability".

Upon this affidavit, section 6 of the act authorizes the publication of a summons to be directed in mere general words against "all persons claiming any interest in " or lien upon the property herein described or any part " thereof", such publication to be made once a week for two months in a newspaper of general circulation to be designated by the court. Nobody is required to be named in the caption.

If the affidavit already referred to should disclose an admission by the plaintiff of existing adverse interests or liens and the names and addresses of the parties thus interested, the published summons is required to state these facts in a subjoined memorandum.

The summons is required "to be posted in a conspic-
" uous place on each parcel of the property described in
" the complaint within fifteen days after the first publi-
" cation of the summons".

Provision is made by section 6 for personal service of summons on all persons "disclosed *by the affidavit*" as having an interest, if they be found in the state, or by mail if they be out of the state and their addresses known, or if they be residents of the state and cannot with due diligence be found within the state, then by mail addressed to such persons at the county seat of the county in which the action is brought.

It will be noted that the act contains no provision whatever requiring the plaintiff *to make any effort* to

discover adverse claimants or lienholders, nor does it require the court itself to be satisfied by the affidavit that any inquiry has been made as to the existence or non-existence of adverse claims or of "defendants". Service by mere publication is authorized upon the bald statement of *the plaintiff*, whose interest is, naturally, to conceal rather than reveal. The Supreme Court of the state, when the question of the constitutionality of the act first came before it, did not satisfactorily meet this vital point, but, in answer to a petition for rehearing based upon the argument that a mere statement of ignorance of the existence of adverse interests, without a showing that reasonable inquiry had been made, did not warrant constructive service, it said:

> "In response, however, to some suggestions contained in the petition, we desire to definitely express our views regarding a point left undecided by the original opinion. On further consideration we are satisfied that section 5 of the Act requires the plaintiff to set forth in his affidavit a showing of the inquiry made by him to determine whether or not there is any other person 'who claims or may claim any interest in or lien upon the property, or any part thereof adversely to him'."
>
> (For certified copy see p. 204.)

These words were the final written opinion on this point in *Title and Document Co. v. Kerrigan*, 150 Cal. 289, but they were never printed in the reports as part of the opinion. The court concluded to hear the matter still further in another case and finally, in *Hoffman v. Superior Court*, 151 Cal. 389-390, it correctly, as we believe, construed section 5 to require no evidence what-

ever regarding possible adverse interests to be presented to the court other than the plaintiff's naked statement as to whether he knew, or had been informed that there were, or were not adverse claimants or lienholders. It decided:

> *"The only inquiry necessary to enable him to make the statement required in the statute on this point is a scrutiny of his own mind and memory"* (p. 390).

With such a statement in the affidavit, the court says:

> "If the affidavit and proceedings are otherwise regular, the court will have jurisdiction to proceed to trial and judgment" (151 Cal. 389-391).

In the case, *Zeiss v. All persons,* now being considered, one who was a mere *tenant* made affidavit that he did not know and had not been informed of any claim to the property adverse to his own claim of *ownership in fee.* The Superior Court accepted this as a sufficient basis to authorize publication of a summons directed simply to "all persons", etc., and nobody appearing to contest within the time allowed by the act, it ordered, in conformance with the act, a "decree" entered,

> "that the plaintiff is the owner in fee simple absolute and entitled to the possession of the several parcels of land in the complaint on file herein and hereinafter particularly described, and that no other person has any right, title, interest or estate in and to the same or to any part thereof, whether the same be legal or equitable, present or future, vested or contingent, and whether the same consists of mortgages or liens of any description".

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The effect of this decree is set forth in section 11 of the act; it

> "shall be binding and conclusive upon every person who, at the time of the commencement of the action, had or claimed any estate, right, title or interest in or to said property or any part thereof, and upon every person claiming under him by title subsequent to the commencement of the action".

It appears by the certificate of the Court of Appeals that the complainant's grantors were, during all of the time in which these proceedings were had, citizens and residents of California, not seeking to evade, but ready to accept service of process and easily reached for that purpose, and that no service of process was made on them and that they had no notice of the pendency of the action and gained no knowledge of the existence of the "decree" until more than a year after its entry.

Notwithstanding the allegation of these facts in the bill of complaint, the Circuit Court sustained the "binding and conclusive" nature of the so-called decree and held that it had worked a divesting of the admitted fee simple title of the complainant's grantors and had given that title to Zeiss, who, in fact, never had had more than an unexpired leasehold interest in the land. It accordingly sustained a demurrer and dismissed the bill.

The bill of complaint alleges no fraud against the respondent. The complainant had no evidence of fraud and it is possible that the appellee here proceeded in the state court in the belief that he was asserting a right actually vested in him.

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Upon these facts, the Court of Appeals asks of this court its advice, as to whether or not the statute of California has, in effect, deprived the complainant of its land without due process of law and in violation of the fourteenth amendment to the constitution.

The decision of the court must be reached by a determination of one or both of two great questions, viz.:

1. Is the proceeding authorized by the act in question a judicial proceeding, or is it, notwithstanding its use of judicial forms and names, merely a non-adversary proceeding, upon which a conclusive decree divesting title cannot be based?

2. The "decree", so called, was entered without notice to or knowledge by the owners, resident and present in the state, of the pendency of the proceeding affecting their title, except that implied by publication in a newspaper. No effort was shown to have been made to ascertain these adverse claimants upon whom personal service should have been made; no reason or excuse was given for not making or requiring personal service, or for authorizing substituted service. **The actual owners of the land had not even the opportunity to catch their own names in glancing over the newspaper notices since they were simply described as "all persons".** Is not such a decree a nullity?

We are not unmindful that upon us rests the responsibility of presenting an argument upon these grave questions without unduly trespassing on the patience and endurance of the court, but the fundamental char-

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acter of the questions involved makes it exceedingly difficult to present the case within the ordinary limits of a brief.

Before entering upon a discussion of the "McEnerney Act", we may be pardoned for suggesting that the legislature which adopted it, was unwilling to give to the measure a longer life than three years (section 18). Thus it confessed that, within its loose provisions, grave dangers lurked that owners of property might be deprived of their belongings in the precise way in which the complainant's grantors have, on the record, lost their property. A moment's comparison of the aim and methods of the various Torrens Acts will, we venture to say, evoke wonder that even the emergency of San Francisco should have driven the Supreme Court of the state into overthrowing, as we submit they did, the generally conceded principles that lie at the very foundation of all judicial procedure. It would have been far better, if that high court had set aside all thought of mere convenience and, in answer to the pressure in the name of necessity brought upon it by numberless "title-procuring" companies, answered as this court did, by the words of its great Chief Justice, in the case of *Craig v. State of Missouri,* 4 Peters 438, when its decision in a particular way was called for as the means of preventing civil war:

> "To these admonitions we can only answer, that if the exercise of that jurisdiction which has been imposed upon us by the constitution and laws of the United States shall be calculated to bring on those dangers which have been indicated, or if it

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> shall be indispensable to the preservation of the union, and consequently of the independence and liberty of these states, these are considerations which address themselves to those departments which may with perfect propriety be influenced by them. This department can listen only to the mandates of law, and can tread only that path which is marked out by duty."

It is absurd to assume that we at all deny the ample power of the legislature to enact statutes entirely adequate to the situation presented by the destruction of the records. We do contend that the particular statute in controversy is invalid; that it is unreasonable in spirit; unsound and dangerous in principle, and intolerable in practice. It gratuitously disregards the safeguards heretofore conceded to be indispensable, and contains within itself indisputable evidence of hasty preparation and want of consideration of consequences.

Was it necessary to protect possession? We have not seen that the evidence of possession was destroyed. On the contrary boundaries were the one thing conspicuously evident after the fire. If it were true that by the destruction of the records the evidence of title was destroyed (which is not the fact: see Stats. Extra Session, 1906, p. 70), then by that very destruction possession itself became impregnable. By the McEnerney Act mere possession is still further dignified and may be readily made conclusive. Thus (on the false assumption that evidence of title was lost), there is taken away from the true owner the fair chance he otherwise had of proving his rights.

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Whatever need there may have been, or may now be, for a statute to establish titles of record, it cannot be seriously contended that the interests of San Francisco will not be better subserved by a new act calmly and deliberately drafted with a view to safeguard and preserve all just rights. The panic is past. There is no longer any psychological justification for the act. The dangers anticipated never were realized. Except by the instrumentality of this very statute land has not been "jumped", nor titles obliterated or impaired. Nobody in San Francisco need now fear that he can not prove his title, *provided that he be given the opportunity.*

In allaying unfounded apprehensions the statute may have served a temporary purpose, but can it be contended that, at the present time, the effect of holding the act invalid would be more inconvenient than in numerous other well-known instances in which courts have performed the duty imposed upon them?

The legislature, no doubt, would pass a new act providing for the utilization of the mass of evidence known to exist. After the Chicago fire the abstracts of title remaining were comparatively few and incomplete. But because the public records were destroyed Illinois did not on that account discard such evidence as remained; on the contrary it was completely utilized. In San Francisco the evidence of titles is substantially complete. Abstracts prepared with the greatest care in the course of business, verified and re-verified, checked and rechecked, cover the whole city; upon their correctness many millions of dollars are staked. These abstracts

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have, it is true, been made evidence (Stats. Extra Session, 1906, p. 70); but in the haste and panic of the extra session the legislature did not require even the petitioner in the McEnerney proceeding to take any account whatever of this mass of evidence; he is permitted to devest, without notice, the title of adverse claimants upon his own *ex parte* oath that he does not know that any claimant exists. If he cannot make this oath he may deed to some one who can. In no event need he expend the very few dollars necessary to discover the condition of the title as it appeared of record before the fire. Will anyone say that it is for the good of the community that hundreds should lose their properties altogether in order simply that unconscientious plaintiffs may be permitted to save the few dollars of expense that an examination of notorious sources of information would entail?

Summary of Argument and Index.

The case requires an examination of three cognate principles:

I. NOTICE: To constitute due process of law in judicial proceedings involving adversary rights of property there must be adequate notice, giving a real and substantial, and not merely a formal and illusory, opportunity to controvert the plaintiff's allegations. This is axiomatic.

Roller v. Holly, 176 U. S. 398.

II. PARTIES AND PRIVIES: A judgment, in such cases, can conclude the rights of parties and privies only. This is an "immutable principle of natural justice".

Hollingsworth v. Barbour, 4 Pet. 466, 475.

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III. RES JUDICATA: This signifies "that the court has after "argument and consideration, come to a decision on a contested "matter". This is "res judicata according to the law of any civil-"ized country".

Jenkins v. Robertson, 1 Scotch App. 117.

See also

Tregea v. Modesto, 164 U. S. 179.

Of course, this means that there must be either an actual trial of contested issues or a default after due notice in a case in which an adversary is disclosed who may be served with notice.

1. The act is invalid even within the extreme doctrine of Tyler v. The Judges, 175 Mass. 71, because it does not require any effort to ascertain claimants before concluding the rights of those who are undisclosed, and therefore unnotified (p. 17).

2. The rule of the Massachusetts case, notwithstanding its safeguards, is not sustainable as providing due process in a case in which the citizen has, as here, been deprived of his property without effectual notice (p. 42).

(a) In proceedings termed quasi in rem "there is a suit against a personal defendant by name" (The Ad. Hine, 4 Wall. 571, 572); and such actions, "differ among other things from actions which are "strictly in rem in that the interest of the defendant is alone sought "to be affected, that citation to him is required and that the judg-"ment therein is only conclusive between the parties" (Freeman v. Alderson, 119 U. S. 185).

(b) No reasonable notice can be imparted by a publication not naming or describing the person to be cited, and not making any allegation against him. The naming of the party is "of the very life of the notice" (p. 47).

3. The "decree", so-called, rendered under the provisions of the act was not rendered in a judicial proceeding. It was a mere declaration of right upon an ex parte application. To make such declaration is not the exercise of judicial power, which alone, under the Constitution, is due process of law, potent to transfer property from one citizen to another (p. 63).

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"It is practically an ex parte application * * * for the deter-
"mination of a question which may never in fact arise." "A mere
"barren right, a purely moot question."

Tregea v. Modesto, 164 U. S. 179.

(a) The complaint alleges no violation, or threatened violation of right: discloses no controversy; designates no defendant.

"That is judicial power which in a controversy, decides the right
"to property between citizens or proper parties." (Miller on the Constitution, p. 348.)

Judicial power requires a case of "private rights or private property infringed or in danger of actual or threatened infringement." (Georgia v. Stanton, 6 Wall. 50.)

Therefore courts have no jurisdiction of fictitious controversies (p. 73); they lose jurisdiction of suits where the controversy has been settled (p. 74); they refuse to give opinions on moot questions (p. 76); and if an opinion is unnecessary to the determination of the controversy, such opinion is obiter dictum, not a decision (p. 74).

"A sentence is a judicial determination of a cause agitated between real parties, upon which a real interest has been settled; in order to make a sentence there must be a real interest, a real argument, a real prosecution, a real defense, a real decision."

Bandon v. Becher, 3 Cl. & Finn. 479, 511; Eng. Rep. 6 H. L.

"There must be a litigation upon actual transactions between real parties, growing out of a controversy affecting legal or equitable rights as to person or property."

Marye v. Parson, 114 U. S. 325.

(b) The so called "decree" was rendered upon a mere ex parte application; it can not be admitted as res judicata.

"Res judicata signifies that the court has, after argument and consideration, come to a decision on a contested matter."

Jenkins v. Robertson, 1 Scotch App. 117.

See also

Tregea v. Modesto, supra.

A "decree" by an admiralty court for the sale of a ship on the master's petition "is not conclusive upon the owner or third per-

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sons, because it is made upon the application of the master and not in an adverse proceeding. * * * The proceeding, being ex parte, can not be deemed conclusive in favor of the party promoting it."

The Schooner Tilton, 5 Mason 465, 474.

4. The proceeding invented by the McEnerney Act is neither an action at law nor in equity. It purports to take away property rights from those who do not voluntarily make themselves parties to it. If they do, though they may be non-residents entitled to remove the cause into the Circuit Court in a cause at law or in equity, the Circuit Court can not entertain jurisdiction, because it has not the power to make a decree binding on all the world, as must be done, under this statute. A state law which, in effect, nullifies the jurisdiction of the Federal Courts, and prevents the administration of the Federal laws, is in contravention of the constitution (p. 112).

Under a statute of Washington authorizing the parties in favor of and against the upholding of a will already admitted to probate, to take sides on that issue as in a suit inter partes, it was held by this court that, if the citizenship of the parties permitted, the Circuit Court would ordinarily have jurisdiction, but it was also held that

"since the statute causes a decree in favor of the petitioner, revoking a will already admitted to probate, to inure not only to the benefit of a particular contestant, but to be operative as to the whole world",

the Circuit Court could not take jurisdiction.

O'Callaghan v. O'Brien, 199 U. S. 89.

Regarding the power of the state to legislate so as to defeat the jurisdiction, this court has said:

"If this were possible, then the only thing the legislature of a state would have to do to destroy the right of removal entirely would be to simply change and modify the details of procedure."

Madison Co. v. Min. Co., 196 U. S. 239, 249, 253.

It is evident that the Federal Constitution does not contemplate the possibility of a judgment at law or a decree in equity concluding the rights of persons not parties.

5. The action provided for by the McEnerney Act is not an action in rem, though the statute may so call it. Assuming the presence of

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an actual controversy, which in fact was not disclosed in the case in which the "decree" now being reviewed was rendered, such a suit is merely an action "against a person in respect of a thing". It is not in rem, but de re (p. 137).

The res, certain land in San Francisco, was not sued; it was not liable for anything, nor was its owner liable for anything done in its use, or for its benefit. One claiming to be its owner seeks by the action to enforce a mere ordinary right of property, to quiet his title thereto.

If this

> "is a proceeding to enforce an ordinary right of lien or of property only, the proceeding is not in its nature a proceeding in rem and the legislature can not make it so by providing that all the world shall be barred."

Justice Loring in Tyler v. The Judges, 175 Mass. 71; 55 N. E. 812; stating on this point the opinion of the court.

> "To say that the legislature may prescribe such notice as is appropriate to proceedings in rem and then invest the proceeding with that character, is to affirm its power to annul the constitutional requirement"

regarding notice.

> State v. Guilbert, 56 Ohio S. 575; 47 N. E. 551.

The distinction between proceedings in rem and proceedings in personam is substantial and can not be destroyed by the legislature without "evasion of the constitutional rights of the parties." (McNamara v. Casserly, 61 Minn. 335; 63 N. W. 880.)

6. The act can not be sustained as analogous to the common law fine (p. 123).

> "The statute of fines was a short statute of limitations; but although short, it was not arbitrary. It was not content with a mere adverse possession. While it abbreviated the slumber, it increased the solemnity and frequency of the warning."
>
> McGregor v. Comstock, 17 N. Y. 169.

The statute of fines was replete with safeguards (3 Bla. 356-7).

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A fiduciary possession could in no case be used to devest an estate.

"It would be absurd; and if a practice of this kind was suffered to prevail, a court of equity might as well be abolished by act of parliament."

Pomfret v. Windsor, 2 Ves. Sen. 472.

7. The act can not be sustained as a statute of limitations (p. 130).

The "decree" is itself given imperative effect, dependent in no way upon lapse of time, or possession thereunder, and may, in any view, only be vacated within a limited time, "on such terms as may be just".

8. Review of certain cases that have been cited in support of the act (p. 173).

9. Conclusion (p. 200).

This case is as fundamental and important as Pennoyer v. Neff, which is probably the most cited of all American cases.

The purpose of the present act can be constitutionally accomplished: it is not necessary to cast away all safeguards as if they "consisted more in sound than in substance".

Argument.

THE ACT IS INVALID, EVEN WITHIN THE EXTREME DOCTRINE OF THE MASSACHUSETTS CASE, FOR NOT REQUIRING ANY EFFORT TO ASCERTAIN CLAIMANTS BEFORE CONCLUDING THE RIGHTS OF THOSE WHO ARE UNNOTIFIED BECAUSE ALLEGED TO BE UNKNOWN.

Without in any respect approving or disapproving the plain and definite (though, we believe, erroneous) principle upon which alone certain of the various Torrens Acts have been sustained, the court may, and, we think, should hold the present act unconstitutional. The grave and delicate duty of weighing the reasoning of the Ohio and Illinois courts, on the one hand, with that of the

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Massachusetts and Minnesota courts on the other, may well await the exigencies of some future case and the filling of the vacant places on this bench. For the purposes of the present certificate it is only necessary to assume, for the sake of the decision, and without going farther, that the rule of the Massachusetts and Minnesota cases is concededly extreme; that the rule cannot, with due process, be substantially extended; and that by the utmost stretch of the rule the California statute can not be sustained.

This rule is simply and briefly, as stated in the majority opinion in *Tyler v. The Judges,* 175 Mass. 71; 55 N. E. 812,

> "that in cases in which, under the constitutional requirements of due process of law, it heretofore has been necessary to give to parties interested actual notice of the pending proceeding by personal service or its equivalent, in order to render a valid judgment against them, **it is not in the power of the legislature, by changing the form of the proceeding from an action in personam to a suit in rem, to avoid the necessity of giving such a notice, and * * * under this statute, personal rights in property are so involved, and may be so affected, that effectual notice, and an opportunity to be heard, should be given to all claimants who are known, or who by reasonable effort can be ascertained."**

In applying this principle the majority said:

> "It would hardly be denied that *the (Massachusetts) statute takes great precautions to discover outstanding claims,* as we already have shown in detail, or that notice by publication is sufficient with regard to claimants outside the state. With

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> regard to claimants living within the state, and *remaining* undiscovered, notice by publication must suffice, of necessity."

That both the principle and its application are extreme was, it seems to us, put beyond doubt by Justice Holmes, who, expressing not only the views of the majority but his own views as well, said:

> "We agree that *such an act as this is not to be upheld without anxiety.*"

And again:

> "I am free to confess, however, that with the rest of my brethren, I think *the act ought to be amended in the direction of still further precautions to secure actual notice* before a decree is entered, and that if it is not amended *the judges of the court ought to do all that is in their power to satisfy themselves that there has been no failure in this regard* before they admit a title to registration."

Constantly, throughout whatever course the argument may take, it will be necessary to have in mind the following cases:

State v. Guilbert, 56 Ohio St. 575; 47 N. E. 551;
People v. Simon, 176 Ill. 165; 52 N. E. 910;
Tyler v. The Judges, 175 Mass. 71; 55 N. E. 812;
State v. Westfall, 85 Minn. 437; 89 N. W. 175;
Dewey v. Kimball, 89 Minn. 454; 95 N. W. 317.

The Guilbert case held the Ohio statute void on substantially the grounds taken by the minority in the Massachusetts case. Considerable safeguards were provided by the Ohio act. Correct abstracts were required; there was an official examiner of title, and all persons

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appearing to have any interest were required to be made parties and notified. Persons who, nevertheless, did not receive notice were permitted to bring an action within five years after decree; or might thereafter, within four years after discovery of their loss, bring action against an insurance fund provided for. The decision was unanimous and seems to us sound.

People v. Simon, 176 Illinois 165; 52 N. E. 910, was a proceeding in the nature of quo warranto against the appellee, requiring him to show by what authority he was exercising the duties of registrar of titles. There was nobody in the case who could urge that he was being or had been deprived of property without due process of law.

See

Tyler v. The Judges, 179 U. S. 405.

In the late case of

Scheerer v. Deeming, 154 Cal. 138; 97 Pac. 155,

the Supreme Court of California also recognized the established principle that

> "Constitutional guarantees for the protection of person or property can be invoked only by parties whose rights are injuriously affected by the alleged disregard of such guarantees."

The only question properly determinable in the Simon case was whether the Torrens Act conferred judicial powers upon the registrar. The court having decided the question in the negative, very properly sustained the right of the registrar to act under the statute. It might

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be that no one would ever be deprived of property thereunder.

The court intimated, however, that effect might be given to the statute without running counter to the due process clause of the constitution; and agreed that the Ohio statute considered in *State v. Guilbert, supra,*

> "was unconstitutional" for "the only notice which that act required *was to be given by the applicant himself, and in the application it was unnecessary to name any person claiming an adverse interest as party defendant*".

It was also said:

> "Objection is also made that by section 26 any person who has any interest in the land, whether personally served, notified by publication, or not served at all, must, within two years after the entry of the decree, appear and file an answer, and that after the expiration of that term of two years the decree shall (with certain exceptions) be 'forever binding and conclusive upon all persons'. **This provision seems to attempt to make a decree binding upon persons not parties to the suit, and, if given effect literally, would deprive persons of vested rights without due process of law.** A limitation may be placed upon the time within which a person who has a mere right of action shall bring it, but 'limitation laws cannot compel a resort to legal proceedings by one who is already in the complete enjoyment of all he claims': Cooley's Constitutional Limitations, 366. *To the extent that the act attempts to transfer property without due process of law it cannot be upheld. On all parties to the suit properly before the court the decree may, after the lapse of two years, become conclusive and forever binding,* and as to all who have merely a right of action the expiration of two years may complete the bar. Even though the lan-

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guage of this section may be broad enough to amount to an attempt to transfer an estate by the law or by decree, yet it is possible to carry out the purposes of the act without violating the constitution in the respect complained of. Such objectionable features, or those calling for construction, must be left to future legislation, or determination by the courts in cases where the conflict is apparent and the question directly involved."

Again:

"The exception taken to these provisions is, that they authorize judgment to be taken against a resident of the state upon mere constructive service. *It is certainly fundamental that no man shall be condemned unheard or without notice.* While a substituted service is permitted in some instances, particularly in case of non-residents, this is because of the necessities of the case. The act does contemplate, in some contingencies at least, actual personal service, and the general law provides for publication as to unknown owners and persons in interest and non-residents. An applicant may proceed in this way, and in strict accordance with the act obtain a decree which will be binding beyond all question, so that even if the proper construction of the provision were that it attempted to authorize judgment against a resident notified only by publication, yet the law can be given practical effect, in which event only the particular provision would fail, and not the whole law."

And again:

"It would be alike impracticable and unprofitable to attempt now to give a construction to every provision of this law. The question here is, Does the act violate the constitution so far as to render it void, and therefore furnish no justification for the exercise of the acts of the respondent challenged?

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> In the determination of that question every reasonable doubt must be resolved in favor of the validity of the law."

As far as it goes this is a strong authority against the California act. The court was satisfied that the Ohio statute was void, but thought that the Illinois act could by judicial interpretation and elimination be made to work *as against parties properly brought before the court.* All the precautions, and more, taken by the Ohio act, were provided by the Illinois statute.

Tyler v. The Judges, supra, was upon petition for a writ of prohibition against the statutory "Court of Registration", created by the Massachusetts Torrens Act. No question of due process was involved.

See *Tyler v. The Judges,* 179 U. S. 405.

It was enough to hold that the act was capable of being constitutionally administered, which seems to us to be the fact.

The application for registration was required to be in writing and verified. It was to contain an accurate description of the land to be registered; to set forth clearly other outstanding estates or interests known to the petitioner; to identify the deed by which he obtained title; to state the name and address of the occupant; and to give the names and addresses of the occupants of all lands adjoining. A memorandum was to be filed in the registry of deeds. An examiner of title was to be immediately appointed by the judge, whose duty it should be to make as full investigation of the title as possible and report to the court. Thereupon notice was

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to be given to all claimants thus found to be interested, and to the adjoining owners and occupants, and published as "to all whom it may concern". A copy of the notice was also to be posted in a conspicuous place on each parcel of land included, by a sheriff or deputy sheriff. The court might order further notice.

Clearly the statutory tribunal had authority to proceed, whatever effect its findings might have upon such claimants as did not happen to be ascertained and notified. As to all claimants ascertained and notified there could be a general clearing of title. All claims appearing of record would certainly be ascertained. The *records* of title, at least, could be cleared.

The judges, however, without having before them anybody who could be adversely affected by the discussion, and without the consequent solemnity essential to a decision, expressed varying opinions as to what would be the effect of the findings of the court of registration upon claimants not ascertained or served if and when there should be any such.

State v. Westfall, supra, was a case of quo warranto to determine the respondent's right to the office of examiner of titles. As in the Illinois and Massachusetts cases, there was no one entitled to raise the question of due process. Nobody had been or was being hurt. Naturally, the dicta of the court upon this question were not so complete or satisfactorily reasoned as would have been the case if the question had been involved. The court distinguished the Ohio case, saying:

> "the provisions of the statute passed upon in that case as to notice to all persons having any possible

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interest in the land were not as full as they are in our statute".

In general the test invented by the Massachusetts majority was applied.

Even as it stands, the reasoning of the Minnesota case is based, as we shall in another connection show, upon unwarranted inferences from cases like *Arndt v. Griggs*. Certainly, it cannot be extended to reach a case where, as here, the obvious safeguards, in Minnesota unjustifiably held to be sufficient, are, without any necessity or reason, utterly discarded.

In *Dewey v. Kimball*, 89 Minn. 454, 95 N. W. 317, the Minnesota court had an actual case to decide and promptly found a way to give relief to a person who had had no day in court, saying:

> "It is the duty of the examiner to inquire into the truth of all matters set forth in the application, to search the records and investigate all the facts brought to his notice, and to file a written report for the advice of the court."

And where the examiner, after investigation, was of the opinion that a certain possible claimant should be named as a defendant and served, and where such possible claimant was nevertheless not named or served, it was held that the judgment thus obtained was "void for " want of jurisdiction over the person or party named " by the examiner", the court saying:

> "Prudence upon the part of the counsel for the applicant, to say nothing of the moral aspect of the case, *not only demanded some investigation*, but, in addition, that the examiner's report and suggestion

OPY

> be observed. The applicant and her counsel could not close their eyes to the record in the auditor's office, pay no attention to it, or to what might be suggested thereby, and also disregard, ignore and practically sweep aside the report and advice of the examiner. **If such a course of conduct should be upheld, the Torrens law would prove an instrument of oppression, and its enforcement would result in incalculable injury."**

Obviously in Minnesota, as in Massachusetts, amongst the saving provisions of the statutes there in tentative operation, are thought to be those which require the official examiner "to search the records, and investigate " all the facts brought to his notice, and to file a written " report for the advice of the court", as a condition precedent to fictional notification of claimants who have nevertheless remained unascertained. Certainly it must everywhere be conceded that until diligent *and impartial* investigation has been made in a genuine effort to ascertain claimants, there is no "necessity" such as may rationally be held to overwhelm the constitutional requirement of a substantial notice and real opportunity to be heard before condemnation. This new principle in the interpretation of constitutions, that they must not be disregarded unless it shall seem "necessary" to disregard them—that men must not be condemned in their property without notice and opportunity to be heard unless it shall be deemed "necessary" so to condemn them in order to accomplish a purpose deemed expedient —this recently invented doctrine the California court thought also satisfied by the statute respecting which this court is now interrogated.

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In *Title and Document Restoration Company v. Kerrigan,* 150 Cal. 289, 317-18, the court said:

> "And in this connection it may be well to notice the contention of respondents, that by the terms of the act now under consideration the plaintiff in the proposed action may include among 'unknown claimants' those who, with reasonable diligence on his part, might have become known to him. **It is no doubt true that, so far as substituted service upon a class of unknown claimants is permitted at all, in proceedings which are merely quasi in rem, it rests upon the ground of necessity, and that this necessity will not justify the omission of personal service upon all who could with reasonable diligence be ascertained and found. This principle is recognized even in the cases which sustain the power to bind 'unknown owners' by substituted service in actions of the character now under consideration.** (Tyler v. Judges of the Court of Registration, 175 Mass. 71, (55 N. E. 812); Shepard v. Ware, 46 Minn. 174, (24 Am. St. Rep. 212, 48 N. W. 773).) But we think that, on a proper construction, the act under examination does require the plaintiff to designate and to serve as known claimants all whom with reasonable diligence he could ascertain to be claimants."

Even if the court had correctly construed the act in this respect, the principle of the Massachusetts and Minnesota cases would have been far from applicable. To require a diligent *official and impartial* examination of the sources of information, and service of notice upon all claimants *thus* ascertained, is a quite different matter from the perfunctory and necessarily biased investigation which it is evident that petitioners will themselves make even if required to investigate at all. It is fair to assume that if the Massachusetts statute had

OPY

dispensed with the official examiner and had left *to the petitioner alone* the duty of inquiry and notification, the cogent objections of the minority would have become the decision of the court.

However, in the Kerrigan case, *supra,* although clear that a diligent effort on the part of the petitioner to ascertain claimants was essential to due process, the California court was expressly not clear whether a statement of the facts showing such diligence was necessary in the affidavit that conferred jurisdiction.

We thereupon filed a petition for rehearing in which it was pointed out that the court had held that all claimants, who may with reasonable diligence be ascertained, must be personally served, otherwise the act is unconstitutional within *every* authority. We also showed that the petitioner, under the act, need only state that he "does not know and has never been informed of any "other persons" than those named by him as claiming an interest in the land. We asked: is the affiant guilty of perjury if, having made such oath, it is shown that, *although he did not in fact know of other persons, yet he might have known or have become informed, if he had made a reasonable inquiry and investigation?*

In reply the court said (see certified copy, page 204, *infra*):

> "The petition for rehearing is denied. In response, however, to some suggestions contained in the petition, we desire to definitely express our views regarding a point left undecided by the original opinion. On further consideration *we are satisfied that section five of the act requires the plaintiff*

to set forth in his affidavit a showing of the inquiry made by him to determine whether or not there is any other person 'who claims or may claim any interest in or lien upon the property, or any part thereof, adversely to him'. We are not to be understood as passing, in this proceeding, on the sufficiency of the affidavit filed by the petitioner in the court below. The only questions argued here were those involving the constitutionality of the act, and the question whether the affidavit complied with the requirements of the act was neither presented nor considered. Notwithstanding the issuance of the writ here ordered, the sufficiency of the affidavit may be inquired into by the Superior Court when judgment is applied for."

The affidavit in the case did not contain the averments held by the court to be requisite, yet a writ of mandate was nevertheless issued requiring the Superior Court to proceed to designate a paper for publication, a thing which it was necessarily decided the Superior Court had no jurisdiction to do.

The supplemental opinion of the Supreme Court of California was at once attacked by numerous attorneys appearing as amici curiae. It was demonstrated that the act required no inquiry whatsoever, and it was shown to the court that the seven hundred ex parte proceedings at that time pending in the Superior Court showed it to be the judgment of the bar that the act required no inquiry by the petitioner to ascertain possible claimants.

Accordingly, the court on February 4, 1907, made the following order:

"The opinion filed January 5, 1907, on denying the petition for a rehearing in the above entitled cause is hereby withdrawn, pending further consideration and final determination of the question therein discussed, said question being necessarily involved in Hoffman v. Superior Court, S. F. No. 4755, this day argued and submitted on briefs to be filed."

(See certified copy, page 205, *infra.*)

Thereafter still another view was taken of the matter.

In

Hoffman v. Superior Court, 151 Cal. 386, 389-391,

the court said:

"The theory that a showing of diligence in making inquiry to ascertain whether or not there are other persons having or claiming interests in the property, is necessary to give jurisdiction to the court, is based on a misconception of the effect of the statute. The part of the act which is supposed to contain this requirement is section 5, which, so far as material, is as follows:

" 'At the time of filing the complaint, the plaintiff shall file with the same his affidavit, fully and explicitly setting forth and showing (1) the character of his estate, right, title, interest or claim in, and possession of the property, during what period the same has existed and from whom obtained; (2) whether or not he has ever made any conveyance of the property, or any part thereof, or any interest therein, and if so when and to whom; also a statement of any and all subsisting mortgages, deeds of trust, and other liens thereon; (3) that he does not know and has never been informed of any other person who claims, or who may claim, any interest in, or lien upon, the property, or any part thereof, adversely to him or if he does know or has been

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informed of any such person, then the name and address of such person. If the plaintiff is unable to state any one or more of the matters herein required, he shall set forth and show, fully and explicitly, the reasons for such inability.'

"The language of the third clause above quoted does not require a statement that there are no persons in existence who claim, or who may claim, an adverse interest, **if, in fact, the plaintiff has no knowledge or information of any. In that case, all that is required is that he shall state his own lack of personal knowledge and information that such persons exist. This is a fact which inheres in his own consciousness and of which he alone can have knowledge. The only inquiry necessary to enable him to make the statement required in the statute on this point, is a scrutiny of his own mind and memory.** It is a matter which he could not be 'unable to state' and to which the last clause above quoted can have no application. That clause relates exclusively to the other matters required in the affidavit. For instance, if the plaintiff knew, or had been informed, that there were adverse claimants, it would be necessary for him to state that fact in the affidavit. He might, however, be ignorant of the names or addresses of such persons. In that event, it would be his duty to make diligent inquiry to ascertain such names and addresses. If such inquiry proved ineffectual, it would be necessary for him to give the 'reasons for such inability', and this would include a statement of the steps taken by him in making the inquiry, so that the court could determine whether or not the reasons were sufficient. (Forbes v. Hyde, 31 Cal. 342; Rue v. Quinn, 137 Cal. 651, (66 Pac. 316, 70 Pac. 732).) But as to the positive statement that 'he does not know and has never been informed of' any adverse claimants, the rule must be the same as in the case of an affidavit for publication of summons based on the fact that the defendant is a non-resident of the state,

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under similar statutes. The positive statement of the plaintiff to the fact is sufficient, without giving the reasons for the statement, or the inquiry made to ascertain the fact. (Anderson v. Goff, 72 Cal. 69, (13 Pac. 73); Furnish v. Mullan, 76 Cal. 646, (18 Pac. 854); Parsons v. Weis, 144 Cal. 415, (77 Pac. 1007); Johnson v. Miner, 144 Cal. 785, (78 Pac. 240).)

"This question was referred to, but not decided, in the case of Title, etc., Co. v. Kerrigan, 150 Cal. 289, (88 Pac. 363), in which the statute was held to be valid. It is there said: 'It is not clear that section 5 of the act requires a statement of the examination and inquiry made by the plaintiff to enable him to aver that he does not know and has never been informed of any person claiming adversely.' The point was again before the court in the same case upon the petition for rehearing, but upon the filing of the petition in this case it was left open for further consideration. **We now conclude that, by the terms of the statute, it is sufficient for the plaintiff to state positively, in the language of the section above quoted, 'that he does not know and has never been informed of' any adverse claimant, and that thereupon, if the affidavit and proceedings are otherwise regular, the court will have jurisdiction to proceed to trial and judgment."**

The court then went on to show that the dictum in the Kerrigan case was applicable only to the situation that would be presented in case of a direct attack upon the decree on the ground of extraneous fraud in making a false affidavit to obtain jurisdiction; and that if it were proved in such a case that the petitioner *did* have knowledge of facts sufficient to put him on inquiry as to the existence of claimants, this would tend toward showing fraud, but that the fraud would not affect the jurisdiction of the court.

In fine, the Hoffman case adopts what has always been considered by the bar generally, as shown by the uniform practice, to be the manifestly correct construction of the statute, viz.: **that without any inquiry whatever and without any exercise of diligence, even on the part of the petitioner himself, without inquiry even from his immediate grantor, and upon his mere affidavit that he does not know, and has never been informed of any other claimant—facts that inhere "in his own consciousness and of which he alone can have knowledge"—the court acquires jurisdiction to proceed to a conclusive decree binding the rights of next door neighbors, whose claims might, by the slightest inquiry, have been ascertained.**

At page 392 the court further says:

> "It is argued that constructive service is permitted only because of necessity, and that no such necessity can arise from the mere fact that the plaintiff in the particular case has no knowledge or information of the existence of outstanding claims or interests in the property inconsistent with the title alleged in plaintiff; that this alone cannot justify the dispensing with personal service upon the owner of such outstanding claim, and that before substituted service upon him can be allowed under the constitution, it must at least appear that the plaintiff has made diligent inquiry to learn of the existence of such interests; and that, as the statute requires no inquiry on that point, but only a statement of the plaintiff's ignorance and want of information, it would operate to deprive the owners of such unknown interests of their property without due process of law.
>
> "We are unable to perceive any substantial difference in this respect between this and other instances wherein constructive service is authorized by stat-

> ute. It has long been thoroughly established that, when necessary in order to reach property within the state, constructive service may be made upon non-residents, or persons absent from the state. (Eitel v. Foote, 39 Cal. 441; Perkins v. Wakeham, 86 Cal. 581 (21 Am. St. Rep. 67; 25 Pac. 51).) *In such cases the statute requires no showing of inquiry as to the fact of non-residence or absence, but allows service by publication only, upon the bare affidavit of the plaintiff that such is the fact.*"

Of course, if the McEnerney Act contemplated any diligence whatsoever even on the part of the petitioner, it would have required in the affidavit a statement of the facts showing diligence. As held by the eminent Judge Sawyer, speaking for the court in

Forbes v. Hyde, 31 Cal. 342, 354:

> "the acts constituting due diligence, or the facts showing that he is a necessary party should be stated. To hold that a bald repetition of the statute is sufficient, is to strip the court or judge to whom the application is made of all judicial functions and allow the party himself to determine in his own way the existence of jurisdictional facts—**a practice too dangerous to the rights of defendants to admit of judicial toleration.**"

This is the law in California and everywhere. Yet under the present act the petitioner merely takes oath as to his state of mind. Just like the fact of non-residence, this state of mind is itself an ultimate fact. No question of diligence is involved.

The California legislature, as well as other legislatures, knows how to express the idea that an inquiry be made. Prior statutes are substantially like section 412, C. C. P.,

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and permit publication only when the defendant "cannot, after due diligence, be found". It would seem that the various statutes for publication since the statute of George III, have been unnecessarily circumspect. Such statutes might, if this act be valid, merely have provided that publication shall be made when the plaintiff says *that he "does not know where the defendant is"!* Yet the various acts have taken pains to require a diligent attempt to find the defendant, thus showing that there is *a constitutional necessity for at least so much precaution.*

The analogy attempted to be drawn from cases of service by publication upon non-residents is unworthy of the learned California court. In such cases, it is, of course, only necessary to show the single fact of non-residence *because the immediate legal conclusion from the mere fact of non-residence is that service in any other way than by publication is impossible.* No such conclusion follows from a statement that "affiant does not know and has never been informed". Upon inquiry he may easily learn. Further, it is perfectly established that if the defendant is not a non-resident, the court obtains no jurisdiction—for there is no necessity for constructive service. Here the fact stated, viz.: that "affiant does not know", is not only irrelevant to any question of necessity, but is also in the vast majority of the cases, as in the present, utterly insusceptible of contradiction by proof.

It must, we think, be conceded that before the requirements of due process can be satisfied effectual notice

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and opportunity to be heard must, at the very least, be given to all claimants who are known, or who can with reasonable effort by an official and impartial investigation be ascertained. The Massachusetts case lays much stress on the assertion that the statute takes "great precautions to discover outstanding claims". The Minnesota case said of its statute that its provisions as to giving notice are as full and complete as it is reasonably possible to make them. This was enunciated not as mere illustration, but was the very ratio decidendi. The Ohio statute, although, as has been seen, providing very considerable safeguards, was invalid, not only in the view of the Ohio court, but also in the estimation of the Illinois court, and it seems, also in the opinion of the Minnesota court; yet, compared with the present act, *the precautions there taken may fairly be characterized as extreme.* All the Torrens Acts go much farther than to require *the petitioner* to make diligent search and effort to ascertain claimants. They provide for a thorough and impartial effort and inquiry; and it is conceded by Justice Loring in his dissenting opinion in the Tyler case, that unless there be negligence or lack of good faith on the part of the official examiner *and* the petitioner, all claimants, except those having titles by prescription, will be ascertained and notified. Under the California act, on the contrary, the petitioner is required to make no investigation. He may proceed in disregard of whatever the slightest inquiry may disclose. He need not inquire even from his grantor whether there are any persons claiming an interest in the land, although the grantor may in fact know of the existence of a claim-

POOR C

ant. Yet the "judgment" will be conclusive against the whole world, including him who was known to the grantor to assert a claim. No more dangerous procedure was ever devised.

Persons in possession of land are quite willing to be judges in their own cause. When they believe—and they generally are quite ready to believe—that nobody else has any *good* claim, it is not difficult for them to swear that nobody *claims* any interest.

Of course by "claimant" the petitioner in such case means, or thinks he means, a *"genuine"* claimant—one who has a *"substantial right"* on the *"merits"* of the case, not one who relies on *"mere technicalities"*.

If, however, a possessor of land happens to know of other claimants, and cannot persuade himself that their claims are so entirely without foundation as to justify him in swearing that he knows of no other claimant, he may deed the land to one of the numerous title restoration companies to be deeded back again after the title is "established". No questions need be asked by the restoration company and the possessor of the land may simply neglect to give information. It may be taken for granted that he is the owner, and that nobody else claims an interest. And so, having got the deed, and having put some one in momentary possession of the land under it, the officers of the title restoration company, without compunction (for a consideration), without possibility of perjury, and in entire conformity with the requirements of the act, may swear that they own the property, that they got the title from so-and-so and that they do

OPY

"not know and have never been informed of any other person who claims", etc. Is not the affidavit true? After the "judgment" has been obtained the property is deeded back to the client who sought the company's aid. Whether other claimants will be named and notified depends solely upon whether the real but anonymous petitioner shall, out of court and uncompelled by oath, see fit to inform the title restoration company of the facts known to him, if any are known. Is this the constitutional guaranty that an irrevocable judgment concluding rights of property shall not be made without notice and opportunity to be heard!

Counsel, in the Court of Appeals, conceded a constitutional defect in the Ohio statute, viz.: that the only notice required to be given was by the applicant himself. The Illinois case, also, indicated this as a weakness of the Ohio act. The Minnesota, Illinois and Massachusetts acts do not seem to be open to this serious objection. Under the California act, however, the petitioner makes an affidavit dealing merely with his uninformed state of mind, the court *must* thereupon designate a newspaper for publication, and as in the Ohio case, in substance as well as in form, the only notice given or required to be given is by the applicant himself.

It is to be remembered, too, that the notice to be posted on the property within fifteen days after the first publication need not be posted by a sheriff or other officer, as is required by the Torrens Acts. Little good the posting will accomplish in any case—much less in a case like the present where we were relying and were

POOR

entitled to rely, on the possession of our tenant who himself used that possession against us. Were we required to go upon the land every week until the expiration of the term in 1950? Indeed we had no right to go upon the land at all. But, in any event, whether the notice was ever put upon the property, or whether it remained there continuously, rests on the *ex parte* unsupported and unrecorded oath of the petitioner himself, our adversary. What are the practicable ways of proving, especially after lapse of time, the negative proposition that the notice was never posted, or was not permitted to remain continuously on the land? Further the petitioner himself contrives the description of the property as it appears in the petition and in the notices. It is very easy to devise accurate descriptions that can be identified by nobody without the aid of a survey.

There are cases of erroneous, though inadvertent misdescription. It is not inconceivable that there already have been cases of intentional misdescription. Nevertheless, the "decree" is to be conclusive in this respect, *although the act does not require even the adjoiners to be notified at all, and although they in fact get no information of the proceeding.* Very often, too, an adjoiner would be able to give information of claims to the neighboring land. Everybody knows that the block books antedating the fire are in existence, that from them the assessor made up his rolls, and that copies, kept up to date, are to be found in every important real estate office in San Francisco, as well as in the larger law offices. Is there any proper reason why the act should not have required this notorious source of information

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to be sought? The records of the federal courts are intact. Land may be subject to pending litigation, bankruptcy proceedings or judgment or other liens ascertainable therefrom. Has the legislature of California authority to conclude these matters in this way? Can diligence in examining these records be dispensed with? On the same day on which the McEnerney Act was approved, the legislature passed the following act:

> "When it is desired to prove the contents of any public record or document lost or destroyed by conflagration or other public calamity, and after proof of such loss or destruction, there is offered in proof of such contents *any abstract of title* issued and certified to as correct by any person, firm or corporation engaged in the business of preparing and making abstracts of title issued and certified to as correct by any such person, firm or corporation, the same may be admitted in evidence on proof that the same was prepared and made in the ordinary course of business prior to such loss or destruction, and without further proof by the person who actually made the copies, extracts, notes or memoranda of records, constituting such abstract of title that they were correctly taken from the original record or document."
>
> *Stats. Extra Session*, 1906, p. 70.

It is well known that the abstracts of title referred to in the above-mentioned public statute are those of the various abstract and title insurance companies in San Francisco; that the abstracts were saved from the fire, and that the records of the county recorder's office can be substantially restored, page for page.

Is it not so that every authority upholding constructive notice bases it upon necessity? Why does this very stat-

POOR

ute exact diligence in serving *known* claimants (although studiously omitting the requirement from the affidavit which is to go on the judgment roll), while at the same time requiring no diligence whatever toward ascertaining the unknown? Why does it permit a claimant who *has* used successfull effort, who *does* know, to evade the consequences of his knowledge by conveying to another who can safely make the affidavit? Why require only a momentary seizin? Why not require a description which cannot be made entirely illusory? Why omit the requirement of section 413, C. C. P., of the paper most likely to give notice? Why not have an affidavit and order for publication stating, as in other cases, evidentiary facts to be judicially passed upon? Why permit the posting of notice upon the property to rest solely upon the act and unrecorded word of the biased petitioner? Why in so many respects omit the wise requirements of the Code generally applicable? Is it not more reasonable to say that the statute could not easily be made worse by further omissions than to say that it could not be made better by adding safeguards on the lines suggested by Justice Holmes in regard to the vastly better guarded Massachusetts act? Whatever view the court may take as to the validity of the process provided by a rationally constructed Torrens Act, it can, it seems to us, be neither necessary nor expedient to set before the legislatures of all the states a standard of process so low as that provided by the present act.

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THE RULE OF THE MASSACHUSETTS CASE, NOTWITHSTANDING ITS SAFEGUARDS, IS NOT SUSTAINABLE AS PROVIDING DUE PROCESS IN A CASE IN WHICH THE CITIZEN HAS BEEN DEPRIVED OF HIS PROPERTY WITHOUT EFFECTUAL NOTICE.

The doctrine of the Massachusetts case is that due process of law requires only that diligent and impartial investigation shall be made in an effort to ascertain claimants before jurisdiction attaches to conclude the rights of persons against whom nothing is alleged and who are unnamed in the proceedings. This doctrine is based upon the supposition of a necessity. It is conceded that there is no necessity for proceeding against unknown and consequently unnamed claimants until a fair effort has been made to diminish the number of the unknown; but it is assumed that it *is* necessary to resort to fictional notice in the case of claimants *remaining* unknown. This is of course true if it be deemed expedient to establish, by the form of a judicial decree, the title of the plaintiff as against the possible claims of all persons in the world. The doctrine is, therefore, based upon necessity if by that it is meant that *a purpose deemed expedient* can not otherwise be accomplished *through judicial proceedings.* But the doctrine is *not* based upon necessity if by that it is meant that the desired end, namely, the establishment of an absolute title, can be attained in no other way. A statute of limitations, for example, as brief as required by the balance of convenience under the particular circumstances, will accomplish the same purpose. Nor is the doctrine based upon necessity when it is considered that

it is not a judicial function, nor, as will be shown, within judicial power to proceed to declare rights in the absence of a disclosed controversy respecting them, for unless the plaintiff is able to name an adversary and allege a present or threatened violation of right it has always by all courts been held to be neither necessary nor desirable, in fact impossible, to invoke the jurisdiction of a court.

The Massachusetts doctrine is not, as thought, properly deducible from the principle of the multitude of cases like *Arndt v. Griggs,* 134 U. S. 316, which sustain constructive service where the pleadings disclose a controversy between named parties respecting property within the territorial jurisdiction, and where the necessity of determining the disclosed controversy demands that the named non-resident defendant be in some way brought before the court and his property subjected to its orders. In all such cases constructive service is *juridically* necessary: it is necessary to the determination of a controversy which alone invokes, or can invoke, the jurisdiction of the court. In all such cases the judgment binds only those shown by the record to be parties and their privies; the defendants are personally named and charged in the pleadings and citation; the fact that *their* interests are called in question is given notoriety, and they have, therefore, a fair chance of being informed by their agents and acquaintances of the pendency of the proceeding. None of these things can be said of proceedings that disclose no controversy and name no defendants. It can not rationally be said that the Massachusetts doctrine is founded upon necessity; its founda-

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tion, on the contrary, is nothing other than the assumption that it is expedient to establish an absolute title through the form of judicial proceedings rather than in some other way; that the pecuniary convenience of the petitioner is of more importance than notice to claimants; and that the subconstitutional principle that a judgment not strictly *in rem* can conclude the rights of parties and privies only—**termed by this court an "immutable principle of natural justice"** (4 Pet. 466, 475)—is of less consequence than the simplification of the methods of transacting business in real estate, although this may also be otherwise and legitimately accomplished.

We think the Massachusetts doctrine may fairly be said to be an innovation. Certainly it is opposed by the Illinois and Ohio cases, and it finds no support in the class of cases like *Arndt v. Griggs.*

It is true that by reason of its full provisions for investigation, the Massachusetts statute can divest the property of very few persons without notice and an opportunity to be heard. Nevertheless we cannot agree that it is due process in the case of a man condemned unheard, if he may be told that it doesn't happen often.

In the language of Justice Loring in the Tyler case:

> "The constitutional provision securing to the owner the right not to be deprived of his property, except by due process of law, *speaks to each citizen directly and personally.* It is no answer when a person complains that he had no notice of the proceeding, in which the decree was made transferring his property to another, *to say to him that 99 other persons had notice, and that in 99 cases out of 100 a person would have notice. This provision is not*

a glittering generality to be explained away in any such manner to a man whose property has been devested by a decree made in his absence. It is a constitutional guaranty to each citizen, and no citizen can be deprived of the security given by the constitution to his rights of property *for any counterbalancing of the benefits derived by the multitude against the evil suffered by him.* It is a constitutional guaranty to each citizen that his property shall not be transferred by the judgment of a court to another without his having had in fact an opportunity to be heard, no matter what the consequences may be. *If it means anything short of that, it is not a constitutional guaranty; it is but a rule which may mean something or nothing, as the legislature in its discretion may decide.* Moreover, this is a constitutional guaranty made to each and every citizen equally and alike. *It is no fault of a person residing in the commonwealth, who has an estate in the land covered by the application, that the applicant and the examiner did not know of his claim, if they did not know of it; much less if they allege that they did not know of it, when by the exercise of due care they would have known of it.* It is strange, indeed, if a discrimination can be made between two residents within the commonwealth, as to their constitutional right to be heard before an irrevocable judgment is made concluding their rights of property, *and that that discrimination should finally depend on the negligence and good faith of their opponent, the applicant, and of the court examiner, and, as has been shown, in case of titles by prescription, on that of the applicant alone.* And yet that is the conclusion to which the court has come."

The correctness of Justice Loring's views is confirmed by the decision of this court on writ of error in that very case.

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See *Tyler v. Judges,* 179 U. S. 405, where it is held that whether there has been lack of due process cannot be determined until some *individual* has been condemned unheard. It is not a proposition to be examined *generaliter.*

In *Roller v. Holly,* 176 U. S. 398, the court also examined the facts *of the particular case,* and held that the particular person *then* invoking the aid of the court had not *himself* been given sufficient opportunity to be heard.

Magna Charta said:

> "*Nullus* liber homo," "*no* man shall be dispossessed."

The 5th amendment says: "nor shall *any* person * * * " be deprived of * * * property."

The fourteenth amendment says: "Nor shall any state " deprive *any* person."

We submit that there is *no* constitution that does not emphasize the personal and individual protection of the guaranty.

The whole spirit of our jurisprudence has always been to give to *every* man his day in court. The constitution perpetuates the practice that *no* person shall be deprived of life, liberty or property without due process of law.

That "great precautions" are taken with the result that only *one* man out of *ten* is deprived of his land without a hearing, has never been due process with reference to that man and never can be due process until this court shall adopt a quantitative theory for the interpretation of the constitution.

PROCEEDINGS UNDER THE McENERNEY ACT CAN NOT, WITHOUT VIOLATION OF THE PRINCIPLES OF NATURAL JUSTICE, BE BROUGHT WITHIN THE CLASS OF CASES WHERE CONSTRUCTIVE SERVICE IS PERMISSIBLE.

Proceedings now sometimes loosely termed *quasi in rem*, or *in rem sub modo* are of high antiquity and of nearly universal usage. In all cases there is a definitely stated cause of action specifically alleged against a named defendant.

> "In these cases there is a suit against a personal defendant *by name*, and *because of inability to serve process on him on account of non-residence or for some other reason* mentioned in the various statutes allowing attachments to issue, the suit is commenced by a writ directing the proper officer to attach sufficient property of the defendant to answer any judgment which may be rendered against *him*."
>
> *The Ad. Hine*, 4 Wall. 571, 572.

But such actions,

> "differ, among other things, from actions which are strictly *in rem* in that the interest of *the defendant* is *alone* sought to be affected, *that citation to him is required and that the judgment therein is only conclusive between the parties*."
>
> *Freeman v. Alderson*, 119 U. S. 185.

The prototype and original of actions *quasi in rem*, is the action of foreign attachment by the ancient custom of London, devised for the purpose of enforcing local claims against absconding or non-resident debtors.

There is sound reason for this exception to the requirement of personal notice. If a debtor is a non-resident and refuses either to pay or to submit himself to

the jurisdiction of the country wherein he contracted his obligation, he ought not, in justice, to be permitted thus to deprive the creditor of all remedy. And the same reason applies where the debtor absconds or conceals himself, in order to avoid payment. In both cases he is, in effect, already in default, and if any property of his can be discovered in the country where the obligation subsists, he has no just cause of complaint if it is seized and applied to the discharge of the debt, with such notice to him as the nature of the case permits. The notice given is, according to common experience, generally adequate. If property is attached, it is held by agents whose duty it is to notify him if possible, and if not possible, it is their duty to defend for his interest. There is a definite cause of action stated against a named defendant, and the judgment binds only parties and privies. By reason of the nature of the case the judgment can not go beyond the property attached; in a proper case, and for the reasons before stated, constructive notice is permissible; but in all other respects the proceeding is strictly *in personam* and the judgment therein is subject to all the limitations of judgments *in personam* generally.

As held in the House of Lords, in

Mayor v. Shareholders, 6 A. C. 393, 399-400.

"Foreign attachment *is an incidental process against a defendant to a suit,* who has not appeared, having been summoned according to the course of the court, to compel his appearance. *The only thing which makes such a custom reasonable at all,* and capable of being sustained in law, is, that the court which has jurisdiction over the defendant, *is*

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in substance, by this custom, acting against the defendant alone, to compel his submission to that jurisdiction. For this purpose, it arrests or attaches his goods within the jurisdiction, or the debts owing to him within the jurisdiction (which are equivalent to his goods), *by way of security to enforce his appearance,* in whatever hands they may happen to be found. The stakeholder, the person in whose hands these goods of the defendant may be, or from whom the debt is due to the defendant, has no interest in the matter, and does not suffer in any interest of his own, so long as he is properly indemnified; and the custom, if duly followed, indemnifies him." * * * "and the custom, *being long established, is not in law unreasonable, so long as its operation and effect is strictly limited to its proper object,* that of compelling the submission of a defendant, in an action duly instituted against him before a competent court, to the jurisdiction of that court in that action; *and so long as it is pursued only against that which is ascertained to be the property, or the debt, of that person, the defendant in the action,* in the hands of the garnishee."

The decisions upon this proceeding show clearly how closely it verges upon lack of due process, even when "strictly limited to its proper object".

In *Fisher v. Lane,* 3 Wils. 297, the facts appear in the opinion of the court:

"The now plaintiff Mrs. Fisher, residing in the city of London, is sued in London, by process whereof she has no notice, and does not appear, whereupon the officer attaches the money of John Fisher, the intestate, in the hands of the now defendants Lane and others, that is to say, attaches Mrs. Fisher by the debt owing to her by a third person, i. e., the officer distrains her to appear, if she appears, there is an end of the foreign attachment; it is like the process in the courts of West-

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minster, by way of distraining issues to compel an appearance.

"It is not necessary to repeat particularly the evidence of this judgment in the foreign attachment, which is before minutely stated, and consisted only of minutes taken from a book kept for that purpose, and those minutes which the officer read from a paper in his hand, was the only evidence of the judgment; and if this be all, the judgment is erroneous; it is said to be for the default of Mrs. Fisher's appearance; *she made no default, for it appears, she never was summoned or had notice, which is contrary to the principles of justice;* in short, the whole court were of opinion, that judgment must be entered for the plaintiff Mrs. Fisher, and accordingly the postea was ordered to be delivered to her."

Further, Lord Chief Justice De Grey said:

"Customs of particular cities may deviate from the course of the common law, *but a custom contrary to the first principles of justice can never be good; so this custom not to summon, or give notice to a defendant, in a suit commenced against him is contrary to the first principles of justice,* and (in my opinion as at present advised) cannot be good. The twenty-seven colonies abroad cannot make a law contrary to the law of England, but they may make any law agreeable thereto, *and to the principles of justice but not contrary to the principles of justice.*"

In *Bruce v. Watt,* 1 M. & G. 1, 39 E. C. L. 612, *Fisher v. Lane, supra,* was much gone into, approved and applied.

Nevertheless, as is usual when exceptions however important, distinct or necessary are engrafted upon a fundamental principle, there was an insidious tendency

to pare and whittle away the principle and exalt the exception to the dignity of a general rule.

Such a tendency in England was checked by the decision of the House of Lords in

Mayor v. Cox, L. R., 2 H. L. 239.

At page 266 it is said:

> "In the note to Turbill's Case, Sergeant Williams says, that 'a custom has been said to prevail not to summon the defendant, or give him any notice of the plaint; so that the attachment issued without his privity or knowledge. This custom, however, has been exploded, as being contrary to the first principles of justice; and a judgment of foreign attachment, which appears to have been given without a summons and nihil returned, was adjudged to be erroneous and void; *for inasmuch as the attachment is founded upon the default of the defendant's appearance to the plaint, how can he be said to have been guilty of a default of appearance if he has never been summoned to appear?*'
>
> "*It seems strange that this conclusive reasoning should be considered as displaced by the now practice of pretended notice,* by issuing process, and procuring a formal return of nihil, *a proceeding which may be just if limited to those who contract debts within the jurisdiction, and go away without paying, but a proceeding merely colourable if applied to strangers,* and one that may lead in their case to serious annoyance and wrong, apart from the exercise of unlawful authority."

The court then cited instances of the exercise of the alleged custom, that "have brought scandal upon our law", and said that such extensions of the custom were "not merely different from law, which a valid custom

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" may be, *but contrary to a principle of justice, which* " *no valid custom can be*".

These cases are not only interesting as showing the narrow grounds upon which proceedings by attachment proceed, but are also important as examples of the rare occasions upon which the English courts have had an opportunity to speak the language of due process.

The principles that underlie the procedure authorized by the ancient custom of London have been universally adopted and applied. They lie at the basis of every legitimate and constitutional service by publication. By reason of the fact that equity jurisdiction is ordinarily exercisable only by orders directed against the defendant personally, and do not of their own force and effect operate to affect the title to property, publication even against non-residents is not generally permissible.

Hart v. Samson, 110 U. S. 151; 28 L. Ed. 101.

But, in a proper case, the state may invest the court of equity with power to dispense with an order directing the defendant to execute a conveyance, and to affect the title by mere force of its decree.

Therefore, a court may be empowered

> "by suitable statutory proceedings, to determine the titles to real estate within its limits, *as against a non-resident defendant,* notified only by publication."

This, however, as the court took pains to say, will not justify a pretended notice "against natural justice".

Arndt v. Griggs, 134 U. S. 316; 33 L. Ed. 918.

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In

Meyer v. Kuhn, 65 Fed. 705,

the Circuit Court of Appeals for the Fourth Circuit, Chief Justice Fuller speaking for the court, held void a decree rendered upon publication in a partition suit where the notice was directed to "Sarah E. Meyer, and the un- " known heirs of Henry Meyer, deceased", as "non-residents of the State of West Virginia", on the ground that her name was Elizabeth Meyer and that the notice aforesaid was not reasonable although she was the widow and devisee of Henry Meyer, deceased. Said the Chief Justice:

> "Proceedings in partition or to quiet title are not strictly proceedings *in rem,* for they are not taken directly against property, but they are regarded, so far as they affect property, as proceedings *in rem sub modo,* in respect of which, while **there must be reasonable notice to the parties,** personal service is not essential to jurisdiction, and constructive service may be substituted. *Arndt v. Griggs,* 134 U. S. 316."

See also

Roller v. Holly, 176 U. S. 398.

There is, of course, no doubt that a statute authorizing service by publication upon non-resident defendants, or such as conceal themselves and can not by reasonable effort be found, is due process of law so far as ~~concerns the rights~~ of *the defendants* to property subjected to the jurisdiction of the court. But it must be borne in mind that such proceedings are essentially proceedings *in personam,* affecting the rights of *the defend-*

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ants to property; that they are proceedings *inter partes,* based upon allegations showing a cause of action against designated defendants, and the judgments therein can not go beyond the issues tendered, and are conclusive only as against parties and privies. Although in such cases publication is permitted out of juridical necessity, the notice given must be reasonable and adequate or the procedure will be lacking in due process of law.

There is a further important limitation and qualification of the doctrine of Arndt v. Griggs. Only conflicting titles can be adjudicated upon constructive service even as against named non-residents. The McEnerney Act, however, attempts to conclude non-adversary interests.

Section 11 of the act provides:

> "The judgment shall ascertain and determine *all* estates, rights, titles, interests and claims in and to said property and every part thereof, whether the same be legal or *equitable,* present or future, vested or contingent, or whether the same consist of *mortgages* or *liens,* of *any* description and shall be *binding and conclusive* upon *every* person who, at the time of the commencement of the action, had or claimed *any* estate, right, title, or interest in or to said property, or any part thereof, and upon every person claiming under him by title subsequent to the commencement of the action."

A mortgagor may thus get rid of his mortgage; a lienor of his lien; a trustee of his trust, and, as in this very case, a tenant may "acquire" the fee—and without serving the parties interested, or even naming them or mentioning their interests to the court.

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In

Remer v. McKay, 54 Fed. 432,

Judge Blodgett had occasion to consider a similar question. He held that, notwithstanding *Arndt v. Griggs*, no constructive service can be had upon even a named nonresident when the object of the suit is to obtain a declaration of trust; for the procedure, in such a case, "shocks the sense of justice".

THE McENERNEY ACT DOES NOT PROVIDE REASONABLE CONSTRUCTIVE SERVICE UPON CLAIMANTS WHO HAVE NOT BEEN ASCERTAINED, EVEN IF IT COULD BE CONCEIVED THAT IT DOES REQUIRE ANY PRECAUTIONS TO ASCERTAIN CLAIMANTS.

Even when there is an actual and pressing controversy alleged between named parties, and the defendant is a resident of another state, obviously a case in which there is the utmost juridical necessity for constructive service—*there must, nevertheless, be such form of service as is reasonably calculated to give actual notice and a consequent real, and not merely illusory, opportunity to defend.*

In

Roller v. Holly, 176 U. S. 398, 44 L. Ed. 520,

the principle is stated as follows (page 409):

> "That a man is entitled to some notice before he can be deprived of his liberty or property is an axiom of the law to which no citation of authority would give additional weight; but upon the question of the length of such notice there is a singular

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> dearth of judicial decision. **It is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose."**

Accordingly the court held that where, in an action brought in Texas against a named defendant to foreclose a vendor's lien upon land situated in Texas and within the territorial jurisdiction of the Texas court, actual personal notice was given to the defendant in Virginia (in accordance with the statute) five days before he was required to appear in the action, the notice, *although actual, was unreasonably short.* This, too, in spite of the fact that the defendant could have reached the court in four days, or could have telegraphed in half an hour to some attorney to enter an appearance for him. Further, in case of the entry of a default against him, the defendant could have had it set aside, for under the facts it would have been an abuse of discretion for the trial court to refuse. Nevertheless, the court said:

> "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."

As mere matter of common sense, was not the notice in the Roller case a far better notice than we received in the proceeding now questioned?

This court did not apply a quantitative theory of due process—the court did not consider how many other men would have had sufficient notice under the Texas act—but properly considered only the question, Does the statute deprive the particular party of his property without due process?

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The decision was with reference to the question of *length of notice.* But the rule applied was the rule of real and reasonable opportunity to defend. It makes no difference whether the unreasonableness consists in insufficient *length* or insufficient *breadth* of notice.

The McEnerney Act, we concede, gives sufficient *length* of notice (if the notice were a substantial notice). We contend, however, that *the breadth of the notice is insufficient—that the act does not provide for anything which may properly be considered notice at all.*

In the Roller case, this court tested the sufficiency of the length of notice by seeking the answer to the question, What have the authorities considered a reasonable time for appearance in such cases?

We shall seek to measure the breadth and to test the quantity of the pretended notice provided by the California act by the answer to the question, What have the authorities considered as a fair, just and reasonable method of imparting notice where actual personal service cannot be had?

NO REASONABLE NOTICE CAN BE IMPARTED BY A PUBLICATION NOT NAMING OR DESCRIBING THE PERSON TO BE CITED, AND NOT MAKING ANY ALLEGATION AGAINST HIM.

In the case of an attachment of the property of the defendant in the hands of his agents, there is much more than mere constructive service; there is in fact actual notice of the action given to the defendant through his agents who are employed by him to care for and protect

the property in his absence. Here, on the contrary, by the very requirement of the act, the plaintiff himself is in possession of the property, and is claiming to own it. Consequently there is lacking the notice ordinarily given by attachment.

It seems to be universally considered that publication of summons can give no reasonable notice unless the exact name of the person cited is set forth. Only thus can a defendant hope to know of the pendency of the action even if he should happen to read the obscure paper in which the publication is made. Only thus, certainly, can he hope to be advised of the action by agents or acquaintances who happen to see his name published in that connection.

> "She was not in court, not a party to the proceeding. Notice to.....Clark by publication is not binding upon Helen I. Clark, and she may attack the proceeding collaterally."
>
> *Pennsylvania Co. v. Sears,* 136 Ind. 460; 34 N. E. 15.

In *Fanning v. Krapfl,* 61 Ia. 417, 14 N. W. 727, it was held that a publication against "P. T. B. Hopkins" will not give jurisdiction over T. P. B. Hopkins, the court saying:

> **"Notice by publication, even where there is no misnomer, does not afford a very strong natural presumption that the fact of the pendency of the action will be brought to the defendant's actual knowledge. Notice by this mode is allowable only out of necessity. It must often happen that great injustice is done and great hardships suffered. We are not disposed to open the door any wider than**

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necessity requires. Whoever undertakes to give notice by publication and misnames the defendant, is without excuse. It requires very little care to publish the defendant's name correctly. We are evidently justified in holding the plaintiff who gives notice by publication to a considerable degree of strictness. If we were to adopt the rule contended for by the appellee, that not only can the Christian names be entirely omitted, but the initial letters of the Christian names transposed, this might become the favorite mode of giving notice by publication. It appears to us that we should open the door to mischief of which no one could see the end. It is proper to observe that a published notice is not necessarily sufficient if it is such that the defendant, upon actually seeing it, would probably conclude that it was intended for him. The office of the notice is in part to give the pendency of the action notoriety. It should be such that others than the defendant seeing it, and knowing the defendant or knowing of him, would not probably be misled by it as to the person for whom it was intended."

So publication against "Q. Noland" gives no jurisdiction over Quinces R. Noland,

Skelton v. Sacket, 91 Mo. 377; 3 S. W. 874,

for

"since names are the only marks and *indicia* which human kind can understand each other by, if the name be omitted or mistaken, *there is a complaint against nobody*".

See also

Corrigan v. Schmidt, 126 Mo. 304, 28 S. W. 874.

In

City of Detroit v. Detroit City Ry. Co., 54 Fed. 1,

Judge Taft, speaking for the Circuit Court of Appeals, said (at page 9):

> *"One of the most important requisites of a service by publication is that it shall correctly state the parties to the suit in which the defendant is summoned, and that it shall correctly state the name of the defendant"*

(citing many cases).

Accordingly it was held that a default decree rendered upon publication against the "Washington Trust Company", when the real name of the defendant was the "Washington Trust Company of the City of New York", was void.

To the same effect see the decision of Chief Justice Fuller in

Meyer v. Kuhn, 65 Fed. 705.

It is submitted to be very plain common sense that no publication can give reasonable notice unless the name of the person cited is set out therein. Otherwise "we " should open the door to mischief of which no one " could see the end". Otherwise, "this might become " the favorite mode of giving notice by publication". " The office of the notice is in part to give the pendency " of the action notoriety. It should be such that others " than the defendant seeing it, and knowing the defend- " ant or knowing of him, would not probably be misled " by it as to the person for whom it was intended."

Certainly a claimant will not get notice from his acquaintances, for they will not recognize the description

of the property, and if they do they will think he has sold it.

"Names are the only marks and *indicia* which human "kind can understand each other by." If, then, the name of the person to be concluded is omitted from the published notice, what reasonable chance is there that he will have an opportunity to defend?

In

Netzorg v. Geren, 26 Tex. Civ. App. 119; 62 S. W. 789, 791,

it is well said:

> "Service by publication is, at best, but a miserable substitute for the notice usually required to bring the citizen into court, and is not justified on any ground but that the state has the right to subject the property within its borders to the payment of debts due by a non-resident to it or any of its citizens, and can in no other way adjust rights between non-residents and itself or its inhabitants. The rule is based upon the fiction that property is always in the possession of its owner, either in person or through an agent. Being outside the state, the non-resident cannot be reached by personal service, and it is only through and in connection with his property that any of his rights can be adjudicated. Such being the case, how essential it is that he should be, in the manner prescribed by law, notified of any attempt to subject his property to the payment of any demands against him."

Cases to the same effect might be multiplied indefinitely.

The idea in the mind of Chief Justice Fuller in the Meyer case, *supra*, when he said that cases like *Arndt v.*

Griggs require a reasonable notice to the parties, and that unless the true name of the defendant is published there can be no reasonable notice, is also well expressed in

Ohlmann v. Clarkson, 120 S. W. 1155.

Service by publication was made upon "Mike Ohlman", whereas his true name was Michael Ohlmann. This was held insufficient to confer jurisdiction, the court saying:

> "The question goes to jurisdiction and due process of law. No man may judicially lose his property without his day in court. A day in court proceeds on notice. So, due process of law and jurisdiction depend on notice. * * * When summons is actually served on the right individual by the wrong name, the error becomes immaterial, because he has notice of the suit, and may appear if he choose and plead a misnomer. But absent actual notice when the law for convenience substitutes a constructive notice, **the name of the individual defendant obviously becomes one of the essentials and of the very life of the notice."**

It has been seen, too, that where the petitioner is himself in possession it can not be considered that claimants will get notice by the attachment, even, of the property. For certainly, in such case, the unnamed claimant can not be said to be in possession either by himself or his agents. The petitioner who is in possession is not a representative but an adversary. Under such circumstances the claimant has notice only of an adverse occupancy and that he must bring an action himself within the period allowed by the statute of limitations. He does not know, and cannot know, that

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the adverse occupant has brought an action against him, unless notice of the action is some way brought home to him.

Particularly, in a case like the present, he has not notice even of an adverse possession. He is entitled to assume that his tenant is holding in subordination to the fee, until clearly notified to the contrary.

Are we no longer to have anything safeguarding the fundamental right to notice of an action? Are we not only to abandon the principle of giving notice by the seizure of property in the hands of agents who are representative of the defendant, but are we, in utter recklessness, to throw away as useless impedimenta every possible safeguard heretofore cherished? If such is to be the effect of the panic statute, then indeed will the conflagration have been an irreparable disaster.

THE DECLARATION OF RIGHTS UPON MERE EX PARTE APPLICATIONS IS NOT THE EXERCISE OF JUDICIAL POWER. THE PROPERTY OF APPELLANT CAN NOT BE TRANSFERRED TO APPELLEE EXCEPT BY THE EXERCISE OF JUDICIAL POWER.

> "No court of justice, *acting as such*, would decide on a question of law or fact without a suggestion on the part of the plaintiff, of a wrong, actual or impending. In exercising voluntary jurisdiction, they are rather lending solemnities to certain contracts. *They are rather acting as registration offices than as courts of justice.*"
>
> *Austin, Philosophy of Jurisprudence*, Section 1036.

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"VOLUNTARY JURISDICTION: That kind of jurisdiction which requires *no judicial proceedings;* as the granting letters of administration and receiving the probate of wills."

Bouvier, 3 Bla. 66.

"It is practically an *ex parte* application * * * for the determination of a question which may never in fact arise." "A mere barren right—a purely moot question."

Tregea v. Modesto, 164 U. S. 179; 41 L. Ed. 395.

"What is a sentence? It is not an instrument with a bit of wax and the seal of a court put to it; it is not an instrument with the signature of a person calling himself a register; it is not such a quantity of ink bestowed upon such a quantity of stamped paper: **A sentence is a judicial determination of a cause agitated between real parties, upon which a real interest has been settled; in order to make a sentence, there must be a real interest, a real argument, a real prosecution, a real defense, a real decision."** (*Duchess of Kingston's* case, 20 How. St. Trials 355, 478-9; approved, as summing up "the effect of all the authorities", in *Bandon v. Becher,* 3 Cl. & Finn. 479, 511; Eng. Rep. 6 H. L.)

The "complaint", so-called (though it complains of nothing), alleges merely:

1. That the records have been in a material part destroyed "by flood, fire or earthquake", as the case may be.

2. That the plaintiff, so-called (though he makes no plaint), claims an estate of inheritance or for life, as the case may be, in a certain piece of real property, describing it.

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The defendants, so termed (though there is no charge to defend), are described as "all persons claiming any interest" (though it is not alleged and need not be anticipated that anybody does or will claim any interest).

The "complaint" states no cause of action. A claim of the "plaintiff" is alone asserted. At most there is merely a right alleged, *but no suggestion of any violation of that right, past, present or impending, nor any disclosure of a defendant.*

It is nothing more than the case of a person in possession of land, claiming to be the owner, who applies *ex parte* to the court for a decree declaring him to be the owner, on the ground that nobody disputes his title. If this is not a moot case, it will be impossible to find one.

A right asserted *ex parte* may appear incontrovertible. If there is nothing in one scale of the balance, any matter, however light, will bear down the other scale.

This principle, which goes to the very essence of judicial power, and of due process, is well illustrated by the case of

Cushing v. Laird, 107 U. S. 69; 27 L. Ed. 391.

There, this court had to consider whether a person who did not appear in a prize case, which is as strictly *in rem* as any case known, was concluded *upon the question of title.*

Said Mr. Justice Gray, in delivering the judgment:

> "It does not establish the title of any particular person, **unless conflicting claims are presented to the court and passed upon.** In *Penhallow v. Doane,*

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> Mr. Justice Iredell said: 'In case of a bona fide claim, it may appear to be good by the proofs offered to the court, but another person living at a distance may have a superior claim which he has no opportunity to exhibit. It is true, a general monition issues and this is considered notice to all the world, but though this be the construction of the law from the necessity of the case, **it would be absurd to infer in fact that all the world had actual notice and, therefore, no superior claimant to the one before the court could possibly exist.'** 3 Dall. 91. * * * As incidental to the question of the lawfulness of the capture, prize courts have, doubtless, jurisdiction to determine the liability of the captors for damages, expenses and costs, occasioned by their own wrongful acts, or by the fault of those in charge of the prize while in their custody. *Le Caux v. Eden,* 2 Doug. 594, 610; *The Siren,* 7 Wall. 152 (74 U. S. XIX, 129); *1 Kent, Com.* 359. **But the learning and research of counsel have failed to furnish a single case, where there was but one claimant of property libeled as prize of war, in which a prize court has undertaken to pass upon the validity of his title as against other persons,** or in which its decree has been set up in a subsequent suit as an adjudication of that title as between him and them."

But it may be contended that the affidavit provided for by the act may sometimes show an adverse claimant. It did not in the present case.

The only portion of the act that can bear upon the suggestion is the requirement, in section 5, of an averment *in the affidavit for publication of summons* that the plaintiff

> *"does not know and has never been informed of any other person who claims or may claim, any interest in or lien upon, the property or any part thereof*

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> *adversely to him,* or if he does know or has been informed of any such person, then the name and address of such person."

Taking into consideration not only the complaint provided for by this act, but also the non-traversable averments of the affidavit for publication, is it possible to discover any cause of action? All that can be gathered is this: that the plaintiff is, so he alleges, the owner of the property, and that so far as he knows or has been informed, there is "no other person who claims, or may claim any interest".

The allegations of the complaint determine the jurisdiction of the court. If the complaint does not show a controversy, jurisdiction can not be subsequently acquired. No anticipation of defenses, and, we suggest, *no anticipation of defendants, suffices.*

As held in

Blagge v. Moore, 6 Tex. Civ. A. 359; 23 S. W. 470.

> "The phrase 'matter in controversy', does not signify that there must necessarily be an issue of either fact or law when the case is called for trial, because the defendant may confess judgment, *but it implies that the pleading which invokes jurisdiction must disclose an adversary, and assert a right against him which is not shown by the pleading to be conceded by him."*

See also

Third St. etc. R. Co. v. Lewis, 173 U. S. 457; 43 L. Ed. 766.

In

Attorney General v. Avon et al., 3 De G. J. & S. 637; 33 L. J. Ch. 172,

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it was held that nothing done subsequent to the filing of the complaint can cure jurisdictional defects in the complaint itself, for

> "The substratum falling, the superstructure falls also."

This seems, indeed, a necessary doctrine. It is the filing of the complaint that institutes the action. Unless the court has at that time jurisdiction it can never acquire jurisdiction.

In

Bradstreet v. Neptune Ins. Co., 3 Sumn. 600,

Justice Story had before him the question of the validity of an admiralty decree *in rem* by virtue of which the ship was condemned. The point was whether the decree was binding, *as there was no libel showing cause of condemnation.* The learned justice said:

> "If a seizure is made and condemnation is passed *without the allegation of any specific cause of forfeiture or offence,* and without any public notice of the proceedings, so that the parties in interest have no opportunity of appearing and making a defence, the sentence is not so much a judicial sentence as an arbitrary sovereign edict. It has none of the elements of a judicial proceeding, and deserves not the respect of any foreign nation. It ought to have no intrinsic credit given to it, either for its justice or its truth, by any foreign tribunal. It amounts to little more, in common sense and common honesty, than the sentence of the tribunal, which first punishes and then hears the party—*castigatque, auditque.* It may be binding upon the subjects of that particular nation. But upon the eternal principles of justice it ought to have no binding obligation upon the rights or property of the subjects of

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other nations; for it tramples under foot all the doctrines of international law; and is but a solemn fraud if it is clothed with all the forms of a judicial proceeding. I hold, therefore, that *if it does not appear upon the face of the record of the proceedings in rem, that some specific offence is charged, for which the forfeiture in rem is sought,* and that due notice of the proceedings has been given, either personally or by some public proclamation, or by some notification or monition, acting *in rem* or attaching to the thing, so that the parties in interest may appear and make defence, *and in point of fact the sentence of condemnation has passed upon ex parte statements* without their appearance, *it is not a judicial sentence,* conclusive upon the rights of foreigners, or to be treated in the tribunals of foreign nations as importing verity in its statements or proofs."

No one can, with regard to due process, be summoned into court to defend that which is not alleged against him. The principle is elementary and fundamental, and readily suggests the limits of judicial power. The principle inheres in the meaning of the words "judicial power", as universally employed; in the word "judge", who, Aristotle says, is "he who equalizes"; in the word "lis"; in the word "complaint"; the word "answer"; the word "action"; the word "cause"; the word "libel"; the word "remedy"; the word "relief"; and, in fact, in all words connotatory of litigation. To assert that an *ex parte* suggestion of right, there being no suggestion of violation of that right and no designation of any party defendant, can invoke the exercise of judicial power, is to deny the authority of language as the crystallization of thought, is to invent a new and arbi-

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trary phraseology in its stead, and annul the established principles of jurisprudence.

IT IS NOT A JUDICIAL FUNCTION MERELY TO DECLARE RIGHTS, PRESENT OR FUTURE. JUDICIAL POWER CAN ONLY BE EXERCISED IN RELIEVING, ACCORDING TO THE LAW OF THE LAND, PERSONS WHOSE RIGHTS HAVE BEEN VIOLATED, OR ARE UNDER THREAT OF INFRINGEMENT, THE LATTER BEING IN ITSELF A VIOLATION OF RIGHT. THERE MUST BE AN EXISTING PRIVATE DISPUTE CONCERNING WHICH THE COURT FIRST FINDS THE FACTS, AND WHICH IT THEN ACTUALLY AND FINALLY DETERMINES BY APPLYING THE PRINCIPLES OF THE LAW OF THE LAND.

Coke maintained, in the celebrated *Case of Prohibitions,* 12 Coke's Rep. 63, that the essence of judicial power consists in the determination of private controversies. He said:

> "*Betwixt party and party, concerning his inheritance,* chattels or goods * * * this ought to be determined and adjudged in some court of justice according to the law and custom * * * and always judgments are given, *ideo consideratum est per curiam,* so that the court gives the judgment. * * *
>
> "A controversy of land between parties was heard by the king, and sentence was given which was repealed for this, that it did belong to the common law."

Blackstone recognized the principle. In Book III, p. 25, he says:

> "In every court there must be at least three constituent parts, the actor, *reus,* and judex: the actor, or plaintiff, *who complains of an injury done;* the

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> reus, or defendant, *who is called upon to make satisfaction for it;* and the judex or judicial power which is to examine the truth of the fact, to determine the law arising upon that fact, and if any injury appears to have been done, to ascertain and by its officers *to apply the remedy.*"

At page 23 of Book III, the same author, commenting upon the maxim "*Ubi jus, ibi remedium*", pertinently adds the words, "*whenever that right is invaded*".

Where there is no allegation that the right of the plaintiff is infringed, or under threat of infringement, and where the proceeding is specially designed to meet the absence of contestation, and to cover the case where there is in fact no person to contest, or dispute the "plaintiff's" title, is it not plain that the California courts are "rather acting as registration offices than as " courts of justice"?

Austin, Philosophy of Jurisprudence, section 1036.

It is immaterial whether one looks to the common law for a definition of judicial power, or whether one looks to any other law. Judicial power is, in its nature, the same thing at all times and in all countries.

Montesquieu had no doubt that judicial power is the power that punishes crimes, or judges the matters *in controversy* between individuals.

L'Esprit des Lois, livre xi. c. vi.

And Bryce deems it one of the chief excellencies of our American system that constitutional questions also

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are not discussed and settled in the abstract, but are judicially determined by the courts in particular cases.

> "The court does not go to meet the question", he says, "it waits for the question to come to it."
>
> *Am. Com.*, 252.

It would be impossible to cite the multitude of cases and authorities in which it is held that judicial power cannot exist apart from a controversy. A few must suffice.

In his work on the Constitution, Miller says, at page 348:

> "That is judicial power which, *in a controversy*, decides the right to property between citizens or proper parties."

In

Georgia v. Stanton, 6 Wall. 50,

this court held that to invoke judicial power it requires a case of

> *"private rights or private property infringed or in danger of actual or threatened infringement".*

Cf.

De Camp v. Archibald, 35 N. E. 1056, 1058; 50 Ohio St. 518; 40 Am. St. Rep. 692.

In

In re Canadian Northern Ry., 7 Fed. 653,

the court said:

> "It is essential to judicial action that there be parties and a controversy. Judgment is only pronounced after a hearing. *That would not be judicial action which should determine the existing law*

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in relation to some existing thing, already done or happened without the intervention of parties and the existence of a controversy.''

See also

Brewington v. Lowe, 1 Ind. 21; 48 Am. Dec. 349.

In

Fuller v. Colfax County, 14 Fed. 177, 178,

the court, in applying Blackstone's definition that a court is a place ''where justice is judicially administered'', said:

''To administer justice, judicially, *two parties to a controversy must exist, there must be a wrong done, or threatened, or a right withheld, before the court can act.''*

It is submitted that there is hardly a rule of the adjective law, whether relating to the powers, or jurisdiction, or practice of courts of justice, that does not have its foundation in the basic principle that it is the sole purpose and end of judicial power to determine private controversies. It is solely to accomplish this purpose that the facts are found and the law applied.

A striking application of the principle is to be found in the rule, nowhere better stated than in

Lord v. Veazie, 8 How. 255; 12 L. Ed. 1069;

that where the controversy is fictitious the judgment of the court is a nullity upon which no writ of error can be sued.

Answering the objection that amicable suits were permitted, the court said:

"But there must be an actual controversy and adverse interests."

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See also

Livingston v. D'Orgenoy, 108 Fed. 469.

The principle that courts are constituted to determine private controversies finds its expression, also, in the rule with respect to obiter dictum.

It would be difficult to find a more precise and lucid statement of this rule than in the case of

Carroll v. Lessee, 16 How. 275, 286-7;

> "If the construction put by the court of a state upon one of its statutes was not *a matter in judgment,* if it might have been decided either way *without affecting any right brought into question,* then according to the principles of the common law, an opinion on such a question *is not a decision.* To make it so there must have been an application of the *judicial* mind to the *precise question necessary to be determined* to fix the rights of the parties and decide to whom the property in *contestation* belongs. And therefore this court, and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the *right or title in question between the parties.*"

The principle that courts are constituted to determine private controversies is also the basis of the rule that an appeal will be dismissed for want of jurisdiction where the controversy has ceased to exist.

This rule is well stated in

Dunn v. State, 163 Ind. 317; 71 N. E. 890,

where it is said:

> *"In fact, it is an elementary principle that it is the province of a court to decide real questions or controversies between litigants, and not to decide simply moot or abstract propositions."*

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A most striking example of this rule is to be found in

Cox v. Hakes, (1890) 15 A. C. 506;

where it was held that no appeal was given by the Judicature Acts from a discharge on *habeas corpus.* The acts provide for appeals from "*any judg-*" *ment or order* of Her Majesty's High Court of Justice, " or any judges or judge thereof". It was held that a discharge on *habeas corpus* was neither a judgment nor a judicial order.

Lord Halsbury said that he was

> "brought to the conclusion they" (the acts) "were intended to deal with the cases of hostile litigants, each representing a personal interest; and without hearing or giving an opportunity to be heard, it would be impossible for the High Court to *adjudicate.* This, however, is a proceeding on the part of the court itself examining the lawfulness of an imprisonment for itself; and though it may, it is not bound to do more than satisfy itself of the lawfulness or unlawfulness of an imprisonment. My Lords, it is upon this part of the case that I think the absence of a proper appellant is important."

Then distinguishing a certain case before the Judicial Committee, his Lordship observed:

> "Apart from any practical determination of existing litigation, the Judicial Committee can do what the High Court cannot do; i. e., give advice upon abstract propositions of law."

Lord Bramwell said:

> "But then there are the words of the statute, 'The Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order of Her Majesty's High Court

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> of Justice or any judges or judge thereof.' I have an indistinct misgiving whether in awarding or disposing of a writ of *habeas corpus* a judge of the High Court, or the High Court itself is acting as a court or judge of a court of judicature. *There is no lis; there is no action; these proceedings are entitled ex parte. No doubt Sect. 16 transfers the power to grant writs of habeas corpus, but is that power a power of judicature?*''

Lord Herschell, with the same point in mind, said:

> "The function of a Court of Appeal is to deal with the judgment before it for review, and not to pronounce opinions on a point of law which may remove a difficulty from the path of a litigant in future proceedings."

The principle that courts are constituted to determine private controversies, is also the basis of the rule that no court, unless compelled by the constitution which created it, will give opinions upon moot questions, whether requested so to do by individuals, or by another arm of the government.

It is not a judicial function.

> *Taylor v. Price*, 4 R. I. 362.

Even when compelled by the constitution so to act,

> "the justices do not act as a court, but as the constitutional advisers of the other department."
>
> *Opinion of Justices*, 126 Mass. 557, 567.

And such opinions are not binding in any way as precedents.

> *Taylor v. Price* (*supra*).
>
> *In re Priority of Legislative Appropriations*, 19 Colo. 58; 34 Pac. 277, 278;

In re Senate Resolution Relating to Senate Bill No. 65, 7? Colo. 47; 21 Pac. 478;

State v. Fleming, 70 Neb. 523; 97 N. W. 1063.

In

Ex parte *The County Council,* (1891) 1 Q. B. 725, the act provided that questions concerning the transference of the business, power, duty, or liability from one set of authorities to another might be "submitted for decision" to the High Court of Justice. The Court of Appeal held that no appeal lay from such "decision", inasmuch as the "decision" was not a judicial decision, saying:

> "It appears to have been thought convenient without any *existing litigation justifying the intervention of a court of justice,* that the High Court of Justice might be consulted for their opinion as to which local authority was the proper authority for undertaking such 'business, power, duty or liability.' * * * It is to our minds clear that the legislature did not contemplate **an actual determination of an existing dispute in which a private right was involved, and in which the owner of that private right would have all the ordinary rights of a citizen to maintain it in a court of law."**

We have sought to find, not what it is that constitutes judicial power under the common law, but what it is that constitutes judicial power in the broadest sense—what can possibly inhere in the nature of judicial power. There must, it is plain, be at the very least an existing dispute disclosed concerning private rights.

In

Mags. of Edinburgh, 5 June, 1863, 1 Macph. 887, Session Cases, Vol. I, 3rd Series,

it was held that *the action of declarator does not lie except when the right is alleged to be disputed.*

Said Lord Neaves:

> "A superfluous eulogium has been met with the question—*Quis vituperavit?* And in the same way there is no occasion for declaring a right which is not attacked. * * * *Such actions should be reserved for the determination of matters of present and pressing controversy.*"

So Lord Cowan said:

> "We cannot now pronounce any judgment as to rights that have not been made the subject of debate."

The case of

Cashman v. Cashman's Heirs, 123 Mo. 549; 27 S. W. 549,

also clearly illustrates the principle.

The case of

Blagge v. Moore, 23 S. W. 470,

deals with the principle from the constitutional point of view, and arrives at the same conclusion.

The California courts may, indeed, so far as the federal constitution is concerned, exercise powers not judicial, *if they do not attempt thereby to divest private rights.* When, however, "without the allegation of any specific cause" and "upon *ex parte* statements" a court makes a decree divesting rights of property, the decree

"ought to have no intrinsic credit given to it. either for its justice or its truth * * * and is but a solemn fraud if it is clothed with all the forms of a judicial proceeding."—(Justice Story in *Bradstreet v. Neptune Ins. Co.*, 3 Sumn. 600.)

In the admiralty, where proceedings *in rem* have been known since men went down to the sea in ships, the principle of the present act has been never tolerated.

As said by Justice Gray in

Cushing v. Laird, supra,

a court of admiralty never establishes "the title of any "particular person, *unless conflicting claims are pre-* "*sented to the court and passed upon*".

Courts of admiralty do exercise, in one case, a consultative jurisdiction. The master of the ship is permitted by the maritime law to act as the agent, *ex necessitate,* of the owner, and to sell the ship when she has become non-navigable, when the expense of repairing her would exceed her value repaired, and when her owner can not be communicated with in time for advice. Under such circumstances, the court may be petitioned by the master, and a decree will, upon his showing and the advice of surveyors, be made that the ship be sold. It might seem that this decree of the court, acting *in rem,* would be binding upon the owner. This is believed to be nowhere the law. The reason is that the decree is rendered in an *ex parte,* a *non-adversary* proceeding. The court, in such a case, and for reasons of the highest necessity, exercises a voluntary jurisdiction,

but knows when it exercises the jurisdiction that its decree will be binding upon no one, but will be merely *prima facie* evidence of the master's good faith and rightful exercise of authority.

In

The Schooner Tilton, 5 Mason 465, 474,

Justice Story held that

> "in such a case the decree of sale is not conclusive upon the owner or upon third persons, *because it is made upon the application of the master, and not in an adverse proceeding.* * * * It is *prima facie* evidence of a rightful exercise of authority, but no more. *The proceeding, being ex parte, cannot be deemed conclusive in favor of the party promoting it.*"

See also *Reid v. Darby*, 10 East. 143.

The cases in the California courts under the act providing for confirmation of irrigation districts are not in point where adversary rights in property are involved. The object of the confirmation proceedings was to determine conclusively the fact of the organization of a *quasi* municipal corporation in advance of any controversy, but it is clear that such an *ex parte* proceeding will not be permitted to divest property rights, nor will the decree therein be admitted on the principle of res judicata.

Tregea v. Modesto Irr. Dist., supra, 164 U. S. 179.

The principle which is hereinbefore argued and illustrated that there can be no exercise of judicial power in the absence of a controversy between parties, is forcibly shown in the opinion of this court in

Tyler v. The Judges, 179 U. S. 405, on writ of error to the Supreme Court of Massachusetts. The writ of error there was sued out on the ground that the Land Registration Act was unconstitutional in that it deprived persons of their property without due process of law. No proper notice, it was contended, was provided by the act to be given to parties in interest. The court held that the plaintiff in error did have notice and that, for this reason, he was in no position to claim that he had been denied due process of law in this respect. As to what might be the ruling of the court in a case taken before it by one who had had no sufficient notice and who had lost his land, was a matter not involved. The court quoted its own decision in *California v. San Pablo Co.,* 149 U. S. 308, as follows:

> " 'The duty of this court, *as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it.* When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But *the court is not empowered* to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power or affect the duty of the court in this regard.' See also *Lord v. Veazie,* 8 How. 251, 12 L. Ed. 1067; *Cleveland v. Chamberlain,* 1 Black 419, 17 L. Ed. 93; *Kimball v. Kimball,* 174 U. S. 158, 43 L. Ed. 932, 19 Sup. Ct. Rep. 639."

The very point of the decision on the writ of error was that no controversy between parties involving the constitution was disclosed.

In

Harvey v. Harvey et al., 73 N. H. 106; 59 Atl. 621 (1904),

the plaintiff was in possession of land under a deed from the defendants' deceased father, which provided *inter alia*, that

> "said Nathaniel D. Harvey shall not sell or convey said lot * * * but keep it to build a home on for himself, wife, and his descendants as long as any shall remain; when they cease, then to go to John M. Harvey and Matthew Harvey, their heirs and assigns forever; and in case of a violation by said grantee, or his heirs or assigns of any of these restrictions * * * said land * * * shall revert to and become the property of the grantor and his heirs, etc."

The plaintiff desired to mortgage the premises

> "but is unable to do so because of the defendants' claim that he does not own the premises in fee, and that if he attempts to convey the property it will revert to them".

The plaintiff relied on a statute permitting a person in possession of real property to

> "maintain a bill in equity against a person who makes a claim adverse to his estate,—whether such adverse claim is based upon a record, a written instrument, or otherwise,—to determine the question of title as between the parties, and the court's decree thereon shall be conclusive".

The court, all concurring, dismissed the bill, holding that any construction authorizing a decree in advance of a controversy based upon the allegation of existing facts, would render the statute unconstitutional, *as not conferring judicial power.*

The Supreme Court of California, however, takes the view that judicial power may, under the McEnerney Act be called into exercise, although no controversy is disclosed. As precedents it cites the "granting letters of administration", "admitting a will to probate", "ordering the sale of property of decedents", "distributing estates of decedents", and "determining and declaring heirship" (150 Cal. 289, 319).

Such proceedings are the exercise of prerogative rather than judicial power. The probate courts have always been of special prerogative jurisdiction. When a man dies his property comes *in custodiam legis.* The legislature is under no obligation to provide any particular form of proceeding with regard to the distribution of estates. Rights of succession may, from time to time, be altered. The heir or devisee never did have any vested estate, except in accordance with statutes in force at the time of the death of his ancestor or testator.

Probate proceedings may, therefore, be made conclusive upon all persons interested, not because such proceedings are in this respect judicial, but because it is the exercise of prerogative power. The property is distributed upon such terms and under such conditions as to notice as may be prescribed by statute.

> "The whole subject matter of dealing with the estates of deceased persons is one of statutory regulation."
>
> *Estate of Strong,* 119 Cal. 663.

If a statute regulating the disposition of property upon the decease of its owner should be enacted prior to the decease and before any rights had vested in heirs, we cannot conceive how any question of constitutional law could arise.

So, where an estate has vested in heirs, a statute authorizing the administrator to sell the property as in his judgment "shall best promote the interests of those " who are entitled to said estate", is unconstitutional.

Brenham v. Story, 39 Cal. 179.

But the same act is constitutional as to cases where the title of the heirs did not vest until after statute passed.

Estate of Porter, 129 Cal. 86,

where it is said

> "the right of the heir to inherit the estate being itself the creature of the statute, there can be no question as to its power to impose these liabilities upon the estate *subject to which the property vests in the heir*".

Probate decrees are "conclusive *only* as to the succession or testamentary rights".

In re Burdick, 112 Cal. 387.

We have never heard that the power of a legislature was ever denied with respect to dealing as it sees fit with "succession or testamentary rights".

If the jurisdiction of the probate courts had been kept distinct in form in California, as it is still distinct in substance, the analogy supposed by the Supreme Court thereof to exist between administration proceedings and proceedings having reference to vested and unqualified rights, would, we are convinced, not have been suggested.

Probate proceedings—when a contest is disclosed—are of course pro tanto judicial; but they are judicial only when a contest is disclosed and then only to the extent of the contest.

In

State v. Guinotte, 113 Mo. App. 399; 86 S. W. 884,

it is held that, in the absence of a controversy, the action of the probate court is purely administrative; the court saying:

> *"Because it may be necessary to identify a widow or next of kin to a deceased person does not convert the proceeding into a judicial investigation. It might with equal propriety be said that when a cashier of a bank requires evidence of identification of a person who presents a bill of exchange at his bank for payment, he is engaged in a judicial investigation."*

The case of

Ellis v. Davis, 109 U. S. 486; 27 L. Ed. 1006;

is instructive upon this point. There, after a learned and exhaustive survey of the whole subject of probate proceedings, this court said with reference to the jurisdiction of the federal courts:

> "*So far as it is ex parte and merely administrative, it is not conferred and it cannot be exercised by them at all* until, in a case at law or in equity, its exercise becomes necessary to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties."

In the *Duchess of Kingston's* case, *supra,* Solicitor-General Wedderburn, afterwards Lord Chancellor, said (at p. 472):

> "A probate in common form is not even a judicial act, it is merely official; there is no litigation, no enquiry; the conscience of the judge is not engaged in it."

In

Detroit, L. & N. R. Co. v. Probate Judge, 63 Mich. 676; 30 N. W. 598,

it was held that probate courts cannot constitutionally be granted power to stay proceedings in courts of law and equity.

Said the court:

> "There is, however, a further difficulty in the nature of this court. Assuming the authority which has existed for some time, and to which no objection has been pointed out, to appoint the commissioners or jury of appraisal, this proceeding is one

> of a mixed character, *involving no strictly judicial powers in the court itself, which does not, as such, conduct the appraisal. But when anything is to be done collaterally or outside of the inquest, whereby the power of the court is to be exercised directly on the rights of the parties, the question whether the probate court can do this is very different from its participation in merely prerogative action.* The probate court is a court which, although declared a court of record, and having large and important powers, is nevertheless an inferior court, subject to the review of the circuit courts, *and not designed or adapted to the exercise of the ordinary judicial power, in dealing with litigated questions affecting persons not subject to the exercise of prerogative jurisdiction, and entirely sui juris. The jurisdiction over contentious litigation belongs, under the constitution, to courts of law and equity.*"

If the *ex parte* probate of an undisputed will, concerning which there is no controversy, is a judicial act, why is it that in the absence of statutes providing other modes of review mandamus will lie, not to compel the probate officer to consider the will, *but peremptorily to admit the will to probate?*

Rex v. Raines, 1 Ld. Raym. 361;
Anon., 1 Stra. 552;
Rex v. Betterworth, 2 Stra. 857, 1118;
Smith's case, Ib. 891;
King v. Dr. Hay, 1 W. Bl. 640.

The Supreme Court of California concedes that the "observations" of Justice Brewer, speaking for this court in the Tregea case, are opposed to its conclusions in this respect, but *Sharon v. Tucker,* 144 U. S. 533, is

cited (see 150 Cal. p. 320) as sustaining the proposition that a non-adversary proceeding can invoke judicial power. *Sharon v. Tucker,* was a case in which, under a statute of the District of Columbia, a person having a title by adverse possession, and resting in parol, quieted that title as against the apparent title of record in named defendants. Necessarily the title apparent of record was a cloud on the title of plaintiff which rested merely in parol. The defendants did not *substantially dispute the facts,* probably because they could not truthfully do so. They, however, showed no inclination to put of record an admission of the plaintiff's title, but, on the contrary, fought the case through all the courts, on such grounds as they could consistently urge, the main contention being

> "that a court of equity could afford no relief to the complainants because they were not at the commencement of the suit in actual possession of the premises".

This court held that the rule did not apply where a person having title resting in parol sought to quiet it as against persons having an apparent title of record. In a general discussion as to the propriety of exercising the jurisdiction, it was intimated that it was not necessary to show affirmative acts slandering the plaintiff's title. It is certainly competent for the legislature to say that an apparent title of record is a cloud upon a true title that rests only in parol. It is a wrong to permit the title to remain of record, for the direct and obvious effect of the record is to slander the title of the plaintiff.

In the Sharon case there were *actor, reus, judex, regular allegations, due notice* and all the requisites of due process. In every sense it was *an adversary proceeding inter partes* and the named defendants were enjoined from ever setting up their apparent title. The only connection in which the court said there was no substantial dispute as to the title was with reference to trial by jury in the federal courts.

A study of the Tregea case, we are satisfied, will convince the court that Justice Brewer's reasoning can not fairly be characterized as mere "observations", nor will it be deemed sufficient to cite proceedings on petitions for change of name as in point, or even persuasive, here.

The California court concedes (151 Cal. 40, 47)

> "that, originally, the exercise of judicial power implied the existence of an actual present controversy to be determined".

But the court says that

> "the refinements of civilized life and the necessity for the orderly regulation, determination and protection of human affairs and rights of property, have long required the extension of the judicial power beyond the settlement of controversies which have actually arisen, so as to include the function of providing security against disputes and claims which may arise. Hence, in modern times, the power of the courts may be, and often is, exerted to protect property and rights from possible, though at the time unknown, hostile claims and pretensions, or *to merely declare a status or right, and thereby to forestall and prevent controversies which, but for the judicial declaration, might arise in the course of future transactions or proceedings.*"

Further, the court says:

> "Whether or not this is strictly an exercise of judicial power, as originally instituted, it cannot be denied that it is a power of the class which, from time immemorial, has been committed to and exercised by the courts. At the time the constitution was adopted this class of powers had long been usually exercised by the courts alone."

And again:

> "Furthermore, in such matters, there is always a possibility that there may be a hostile claim or dispute as to the right to be established. If it were necessary to find further justification for classing this power as judicial, this circumstance would be sufficient. *A hostile claim being possible, there is, in contemplation of law, an adverse claim to be settled, a right to be protected against the possible claimant, for which a judicial decree is the only practicable and effectual remedy.*"

The argument in this respect rests, therefore, on two grounds, one an assertion by the court of its opinion as to an historical fact, the other an assertion of a supposed legal principle. The assertion of fact is not reinforced by reference to authority, and no attempt is made to support the assertion of the supposed legal principle.

We have hereinabove cited many authorities which we believe to be decisive in favor of our contention and conviction that it never has been and can not be within judicial power, in the absence of present controversy, *"to merely declare"* (as the California court accurately says)

> *"a status or right, and thereby to forestall and prevent controversies which, but for the judicial declaration, might arise in the course of future transactions or proceedings".*

It is plain that in England it was never imagined that a court of judicature could proceed in the absence of controversy.

Rooke v. Kensington, 25 L. J. (N. S.) Chanc. 705;
Ex parte The County Council, (1891) 1 Q. B. 725;
Cox v. Hakes, (1890) 15 A. C. 506.

The Scottish action of declarator did not dispense with "present and pressing controversy".

Mags. of Edinburgh, 5 June, 1863, 1 Macph. 887, Session Cases, Vol. I, 3rd Series.

If an act of the legislature can compel a court, in the absence of controversy, that is to say, in the absence of litigation, "to merely declare a status or right, and " thereby to forestall and prevent controversies, which " but for the judicial declaration, might arise in the " course of future transactions or proceedings", the extended power need not, of course, be confined to questions concerning the right to lands.

A court may, in the absence of litigation, "declare" the right to personalty; it may "declare" the construction of a contract, although the contract has not yet been violated, and although the parties thereto have never had any dispute regarding its construction, and although it is impossible to know whether the contract ever will be violated or in what respect.

In this country, too, as has been seen, the authorities show that it is not within judicial power to make mere *ex parte* declarations regarding rights.

In *Marye v. Parson,* 114 U. S. 325; 29 L. Ed. 205, 206, the court said:

> "The bill as framed, therefore, *calls for a declaration of an abstract character, that the contract set out requiring coupons to be received in payment of taxes and debts due to the state is valid;* that the statutes of the General Assembly of Virginia impairing its obligations are contrary to the Constitution of the United States, and therefore void; and that it is the legal duty of the collecting officers of the State to receive them when offered in payment of such taxes and debts.
>
> "But no court sits to determine questions of law *in thesi.* **There must be a litigation upon actual transactions between real parties, growing out of a controversy affecting legal or equitable rights as to person or property. All questions of law arising in such cases are judicially determinable. The present is not a case of that description."**

Why did this court refuse to entertain a writ of error in the case of *Tregea v. Modesto,* 164 U. S. 179; 41 L. Ed. 395? Simply because it was not a judicial proceeding, and writs of error lie only to correct errors that have occurred in judicial proceedings. The Tregea case was brought

> "to merely declare a status or right, and thereby to forestall and prevent controversies which, but for the judicial declaration, might arise in the course of future transactions or proceedings".

In other words, as this court said,

> "for the determination of a question which may never in fact arise". "A mere barren right—a purely moot question."
>
> *Tregea v. Modesto, supra.*

Like the case presented by the *ex parte* petition under the McEnerney Act, it was not

> "a litigation upon actual transactions between real parties, growing out of a controversy affecting legal or equitable rights, as to person or property".
>
> *Marye v. Parsons,* 114 U. S. 325, 29 L. Ed. 205, 206.

Says the California court:

> "A hostile claim being possible, there is, in contemplation of law, an adverse claim to be settled, a right to be protected, against the possible claimant, for which a judicial decree is the only practicable and effectual remedy."

In other words, courts of judicature are to be invested with jurisdiction, not of actual cases, but potential cases; they are to exercise jurisdiction in a thousand cases in the expectation that a controversy will arise in some of them, which, however, *may never in fact arise in one.* They are going unnecessarily to decide a right today for fear that it may be necessary to decide it tomorrow. They are going to decide *ex parte* and therefore unjustly today because they *may* be called upon to settle a controversy between parties tomorrow. They are to alter every rule of judicial decision and determine questions before they arise in order to avoid deciding them when they do arise. They are to overthrow the principle of *res judicata,* and by their dicta regulate the future conduct of persons generally.

Every man's rights are to be fixed and defined by *ex parte* judicial declaration, and in order "to forestall

" and prevent controversies which, but for the judicial " declaration, might arise in the course of future trans- " actions or proceedings", we may all go into court for conclusive advice as to what we may properly do as "against all the world".

Is there any right known to the law concerning which a hostile claim is not "possible"? And if with regard to all rights hostile claims are "possible", then courts may be invested with jurisdiction "to merely declare" any right. Here is certainly an unlimited and virgin opportunity for legislatures.

The function of judicature is the putting an end to the differences of individuals, and from this is derived the principle of the conclusive effect of final judgments. The force of a real judgment is so irresistible that out of common reason and justice it has been held for a universal maxim that only parties and privies are bound—a principle of sub-constitutional authority. Only by the most rigid adherence to this principle can justice be even approximated—for, if it be once understood that a person can be concluded without having been made a party, there remains no longer any means of insuring that a plaintiff will make any reasonable effort to name and serve his adversaries.

As said by Justice Loring in the Tyler case:

> "There is not only no incentive to name as defendants those who claim an adverse interest, *but the law has thereby offered to the plaintiff the greatest temptation not to name an adverse claimant if known, and not to use any diligence whatever to discover whether there are in fact persons who claim an interest adverse to his.*"

As said, to the same effect, in *Fanning v. Krapfl, supra:*

> *"This might become the favorite mode of giving notice by publication."*

Courts cannot hope to do justice when they themselves offer the greatest possible premium to injustice. It is true, to paraphrase the language of Seneca, that a judge may, perchance, decide rightly, though only one side be heard, yet it is none the less true that, though the decision accidentally be just, the judge himself is unjust in having thus undertaken to decide.

> "Qui statuit aliquid, parte inaudita altera,
> Aequum licet statuerit, haud aequum fuerit."
> (*Medea,* 199, 200.)

The California court fails to notice that its conclusions are vitiated by the very argument *ex necessitate* which is supposed to vitalize it.

To remove uncertainties regarding the condition of titles is a purely legislative problem, to be worked out by a consideration of the balance of expediencies—by recording acts of various kinds, and by statutes of limitations, longer or shorter, as may be considered convenient. To facilitate the sale of property is, indeed, a proper subject of legislative action. But courts have, and can have, nothing to do with the sale of property or with uncertainties in titles, until questions relating thereto arise in a case in which it becomes necessary to put an end to the disclosed differences of individuals.

An examination of the cases in which constructive service has been justified illuminates the proposition

that the "necessity" that will justify constructive service is a *juridical* necessity—that is to say, the necessity of putting an end to the differences of individuals—the high and only purpose for which courts are constituted—a purpose to the fulfillment of which their functions are adapted as they are adapted to nothing else whatever. However expedient it may be—however profitable to the petitioner—that a particular right should be made more certain, there can be no *necessity* therefor in the juridical sense.

If the person claiming the right will only wait until his right is questioned he will know who questions it and there will then be no necessity for constructive service—his adversary will get actual notice and the court will have a real case to decide.

THE SO-CALLED "DECREE", RELIED UPON BY APPELLEE, WAS RENDERED UPON AN EX PARTE APPLICATION WHICH DISCLOSED NO ADVERSARY, AND CAN NOT, THEREFORE, BE ADMITTED AS RES JUDICATA.

Nobody will contend that the State of California can transfer the property of appellant to appellee except by a judgment rendered in the exercise of judicial power.

This is not a case where a decedent's property has been distributed. It is not the case of the summary collection of the public revenue. It is not the case of the exercise of the sovereign power of eminent domain. Only false analogies may be drawn from the procedure always permissible in such cases. This, on the contrary,

is a case where, if the "decree" of the California court be conclusive, the land of one citizen has been given to another without provision for compensation and for no public use.

In cases like the present due process

> "implies and includes actor, **reus,** judex, **regular allegations,** opportunity to answer, and a trial according to some settled course of **judicial** proceedings".

The only apparent exceptions are cases involving the exercise of prerogative power.

> *Den. v. Hoboken,* 18 How. (59 U. S.) 272; 15 L. Ed. 372, 376.

It follows, we submit, that the so-called "decree" of the Superior Court cannot, with regard to due process, be held conclusive as *res judicata.*

In *Jenkins v. Robertson,* 1 Scotch App. 117, the House of Lords had occasion to consider the extent of the doctrine of *res judicata.*

Lord Romilly said:

> "But on the second point I entertain a very clear opinion. *Res judicata,* by its very words, means a matter upon which the court has exercised its judicial mind, and has come to the conclusion that one side is right, and has pronounced a decision accordingly. But when an action of declarator is brought, and a verdict is obtained by the Pursuers, which is set aside, and an arrangement afterwards takes place by which, in consideration of the payment of a sum of money, an interlocutor is pronounced for the Defenders, and the court simply registers that interlocutor, without expressing any

judicial opinion on the subject, I am of opinion that it is contrary to all principle to consider that such a transaction can be treated really as res judicata. It is admitted that it cannot be res judicata if it is done by collusion or by fraud. It is argued that in this case no fraud is alleged or proved; but it is very difficult in any case of this description to prove fraud; **and if this were held to be a judgment binding strangers, by reason of its being res judicata, it would follow that in every case, where any person had brought an action of declarator, which had been compromised, the public would be bound unless some stranger could prove that the judgment had been obtained by fraudulent collusion between the parties. I am of opinion that this is not the meaning of res judicata according to the law of any civilized country.** I am of opinion that it was not competent for the court in the present proceeding to go into the question whether this was a reasonable compromise or not. It was impossible that the court could ascertain that. *In my opinion res judicata signifies that the court has, after argument and consideration, come to a decision on a contested matter; here the court exercised no judicial function upon the subject. It has merely exercised an administrative function by recording the interlocutor which had been agreed to between the parties.*"

In the Duchess of Kingston's case, 20 How. St. Tr., at pp. 478-9, the solicitor-general, speaking to the question of what might not be considered *res judicata*, said,

> "What is a sentence? It is not an instrument with a bit of wax and the seal of a court put to it; it is not an instrument with the signature of a person calling himself a register; it is not such a quantity of ink bestowed upon such a quantity of stamped paper; *a sentence is a judicial determination of a cause agitated between real parties,*

upon which a real interest has been settled; in order to make a sentence, there must be a real interest, a real argument, a real prosecution, a real defense, a real decision. Of all these requisites, not one takes place in the case of a fraudulent and collusive suit: *there is no judge; but a person, invested with the ensigns of a judicial office, is misemployed in listening to a fictitious cause proposed to him; there is no party litigating, there is no party defendant, no real interest brought into question;* and, to use the words of a very sensible civilian on this point, *'fabula, non judicium, hoc est; in scena, non in foro, res agitur'."*

This argument was said in the House of Lords to sum up the effect of all the authorities.

Bandon v. Becher, 3 Cl. & Finn. 479, 511.

It is clear that the reasoning of these authorities does not proceed upon the ground of fraud: it proceeds rather upon a view of the essential nature of judicial power. *Jenkins v. Robertson, supra,* was not a case of fraud, nor was the Tregea case.

Whether a matter be *res judicata* depends, as in the case of the twin sister *stare decisis,* upon whether there has been "an application of the judicial mind to the "precise question necessary to be determined to fix "the rights of the parties and decide to whom the "property in contestation belongs."

Carroll v. Lessee, 16 How. 275, 286.

The case of *Tregea v. Modesto,* 164 U. S. 179, 41 L. Ed. 395, illuminates the proposition for which we are now contending. Said this court:

"But going beyond this matter, we are confronted with the question whether, in advance of

the issue of bonds and before any obligation has been assumed by the district, **there is a case or controversy with opposing parties, such as can be submitted to and can compel judicial consideration and judgment. This is no mere technical question.** For, notwithstanding the adjudication by the courts of the state in favor of the validity of the order made for the issue of $400,000 of bonds, and, notwithstanding any inquiry and determination which this court might make in respect to the matters involved, there would still be no contract executed, no obligation resting on the district. All that would be accomplished by our affirmance of the decision of the state court would be an adjudication of the right to make a contract, and unless the board should see fit to proceed in the exercise of the power thus held to exist, all the time and labor of the court would be spent in determining *a mere barren right—a purely moot question.*

"*We are not concerned with any question as to what a state may require of its judges and courts,* nor with what measures it may adopt for securing evidence of the regularity of the proceedings of its municipal corporations. It may authorize an auditor or other officer of state to examine the proceedings and make his certificate of regularity conclusive evidence thereof, or it may permit the district to appeal to a court for a like determination, **but in either event it is a mere proceeding to secure evidence.**

"The directors of an irrigation district occupy no position antagonistic to the district. They are the agents and the district is the principal. The interests are identical, and **it is practically an ex parte application on behalf of the district for the determination of a question which may never in fact arise.** It may be true, as the Supreme Court says, that it is of advantage to the district to have some prior determination of the validity of

the proceedings in order to secure the sale of its bonds on more advantageous terms, but that does not change the real character of this proceeding. * * *

"But if a judgment in such a proceeding as this cannot be invoked by the district as *res judicata* in an action brought against it by the holders of bonds thereafter wrongfully issued, can a judgment in favor of the power be invoked by the holder of such bonds as conclusive upon the district upon the ground of *res judicata?* In order to create estoppel by judgment must there not be mutuality? We do not mean to intimate that it may not have effect as evidence, like the certificate of an auditor declared by a legislature to be conclusive, but is it not simply as evidence and not as *res judicata?*

"Some light may be thrown on this question by reference to a matter of somewhat kindred nature. In states which provide for the organization of corporations under general statute different modes of procedure are prescribed. In some states it is sufficient for the parties desiring to incorporate to prepare a charter, acknowledge it before some official, and file it with the secretary of state, or other public officer, and the certificate of such officer is made the evidence of the incorporation. In other states the parties may file a petition in some court, and that court upon presentation thereof examines into the propriety of the incorporation, and if satisfied thereof enters a decree declaring the petitioners duly incorporated, and the copy of such decree is the evidence of the incorporation. **Does the difference in procedure between these two cases create any essential difference in character? Is the one executive and the other judicial?** Suppose, in the latter case, the statute had provided that either one of the petitioners might appeal from the decree of a lower to the Supreme Court of the state, in order to obtain a final adjudication in favor of the pro-

> priety of such incorporation, would this court entertain a suit in error to reverse such adjudication by the highest court of the state? **Would it not be held in effect, whatever the form, a mere ex parte case to obtain a judicial opinion, upon which the parties might base further action?** It seems to us that this proceeding is after all nothing but one to secure evidence; that in the securing of such evidence no right protected by the constitution of the United States is invaded, that the state may determine for itself in what way it will secure evidence of the regularity of the proceedings of any of its municipal corporations, and that unless in the course of such proceeding some constitutional right is denied to the individual, this court cannot interfere on the ground that the evidence may thereafter be used in some further action in which there are adversary claims. So on this ground, and not because no federal question was insisted upon in the state court, the case will be dismissed."

In the case at bar, the complaint in the Superior Court alleged merely that

> "the estate, title and interest of this plaintiff in and to the above described parcels of land and of each of them is that of owner in fee simple absolute, free from all incumbrances, liens, defects, claims or demands of any kind or nature whatsoever,"

and prayed the "decree" of the Superior Court "adjudging" such to be the fact.

As said in the Tregea case, is not this "in effect, " whatever the form, a mere *ex parte* case to obtain a " judicial opinion"?

Suppose, too, that in the proceeding under this act, Zeiss, the "plaintiff", had been unable to satisfy the Superior Court as to the truth of his ex parte averment of ownership in fee. Would the finding of the court to the effect that Zeiss was not the owner preclude him from showing a title in any action ever after brought by any person in the world? It would be absurd. Yet, as this court said in the Tregea case, "In order to create estoppel by judg- " ment must there not be mutuality?"

There can be no judgment in the absence of a disclosed controversy. And without a judgment there can be no *res judicata.*

> "*Judgment* is a different action of mind", (from apprehension) "and consists in comparing together *two* notions or ideas of objects derived from simple apprehension, so as to ascertain whether they agree or differ. *It is evident,* therefore, that *we cannot judge,* or compare, unless we are *conscious* of *two* things or have the notions of *two* things in the mind at the same time."
>
> *Jevons, Lessons,* p. 12.

Whenever it is a question as to whether A is the owner of a piece of property, that question can never be *judicially* settled in the abstract. A's claim to the property must be compared with B's claim, and a judgment formed *as between the claims compared.* Merely upon a consideration of A's *ex parte* claim it is impossible to render a judgment that A is the owner of property and that nobody else has any interest. No judgment can be given

> "unless conflicting claims are presented to the court and passed upon. * * * 'In case of a bona fide

claim, it may appear to be good by the proofs offered to the court, but another person living at a distance may have a superior claim which he has no opportunity to exhibit. It is true, a general monition issues and this is considered notice to all the world,' " (for limited and special purposes) " 'but though this be the construction of the law from the necessity of the case, it would be absurd to infer in fact that all the world had actual notice and, therefore, no superior claimant to the one before the court could possibly exist.' "

Cushing v. Laird, 107 U. S. 69.

Even in the case of a fund in court to be distributed, the rights of persons who do not come into court and who are guilty of no laches, are not cut off. It is true that having distributed the fund the court cannot in *that* proceeding give relief except to persons who come in. The distributees, however, may be pursued.

Said Justice Field, delivering the judgment in

Ex parte Howard, 9 Wall. 175; 19 L. Ed. 634:

"None of them (the cases cited in opposition to the principle) suggest even the proposition that the judgment or decree affirmed concludes the rights of third parties not before the court, or in any respect affects their rights. *It would have been against all principle and all reason had they asserted anything of the kind.* **There is, indeed, a class of cases affecting the personal status of parties, in which a judgment necessarily binds the whole world, but it is not of those we are speaking, we refer to judgments at law or decrees in chancery, affecting rights of parties to property. They bind only the parties before the court and those who stand in privity with them."**

For example:

A proceeding to collect taxes may proceed strictly *in rem.*

> "They are proceedings which have regard to the land itself rather than to the owners of the land; and if the owners are named in the proceedings, and personal notice is provided for, it is rather from tenderness to their interests * * * than from any necessity."

The state need not, in such cases, proceed judicially.

> "If the state may proceed summarily, we see no reason why it may not resort to such judicial proceedings as are authorized in this case."
>
> *Leigh v. Green,* 193 U. S. 79.

Condemnation proceedings may also be strictly *in rem,* at least so far as the *taking* of the property is is concerned; this is the exercise of sovereign power.

> *Madison, etc. Co. v. St. Bernard, etc., Co.,* 196 U. S. 239;
>
> *People v. Adirondac R'way Co.,* 160 N. Y. 225.

So, it is within the power of the legislature to proceed strictly *in rem,* and itself promulgate an edict of divorce binding upon the whole world, but it must not " attempt to interfere with rights of property vested " in either party".

> *Maynard v. Hill,* 125 U. S. 190.

So, in the case of the collection of public debts and revenues the proceeding may be strictly *in rem* against the property liable. Such matters need not be made the subject of judicial controversy.

> *Den. v. Hoboken,* 18 How. (59 U. S.) 272.

The reason, also, that probate proceedings operate strictly *in rem* is that the probate tribunal is a tribunal having *prerogative and exclusive* jurisdiction of estates, and that no matters with reference thereto are triable in law or equity, at least in the absence of a permissive statute, and then only in case of controversy.

As well said in the argument in the Duchess of Kingston's case (20 How. St. Tr. at p. 467).

> "The cases quoted, of sentences of an ecclesiastical court, are all in matters of which *that court has the peculiar and exclusive cognizance.* The ecclesiastical court has the *sole jurisdiction* of cases testamentary, and of cases matrimonial, to a certain effect; if therefore a question arises, who is entitled to the personal estate of a man deceased with or without a testament, *the probate of the will, or a grant of administration, gives the title to the property in question;* the effect of it cannot be contested in other courts collaterally and incidentally, *because no other court has power to controvert the act, no other authority can confer the title to the thing in dispute.* Such sentences are *in rem.*"
>
> Cf. *Broderick's Will,* 21 Wall. 503, 22 L. Ed. 599, 603.

It seems strange that probate proceedings should be cited against us in a case like the present.

In

Goodrich v. Ferris, 145 Fed. 844,

the court considered the case of *Roller v. Holly,* 176 U. S. 398, in which the defendant, residing in Virginia, was served with process, requiring him to appear and

answer the suit in Texas within five days. Said Judge Morrow, at page 859,

> "It was held that such notice was not a reasonable one and was not due process of law, but the action, although classified by the court under the statute as *in rem,* was *inter partes.* The law in such a case is clearly not applicable to the present controversy, where the proceeding was with respect to the final account and distribution of an estate, *a subject-matter over which the court had exclusive jurisdiction.*"

But, upon this point the Supreme Court of California says:

> "In substance — and the constitutional requirement of due process deals with substance rather than form—the action" (under the McEnerney Act) "does not differ in character from the action to determine heirship (Code Civ. Proc., Sec. 1664), which has always been regarded as a proceeding *in rem* (see *In re Blythe,* 110 Cal. 231, 234) and sufficient to bar the rights of all persons claiming as heirs of the decedent, whether or not they are named in the complaint or personally served with summons." (150 Cal. 289, 307.)

We submit that the proceedings are quite different in substance.

In the Blythe case, the court held that the proceeding to declare heirship was intended to furnish "*the unquestioned basis for the decree of distribution which was to follow.*" (110 Cal. 231, 234.)

In the Grider case, 81 Cal. 571, it was held to be a *probate* proceeding. And in the Burton case, 93 Cal. 459, it was held that the California court has jurisdic-

tion of the proceeding by virtue of the grant of "all matters of probate", made by Const. Art. VI, sec. 5; that the proceeding is incidental to the distribution of estates, and

> "is embraced within the scope of 'matters of probate'—as clearly so as is the sale of real property to pay debts of an estate."

Such proceedings stand on the same footing as inquests for the establishment of escheats.

As held in

> *Hamilton v. Brown*, 161 U. S. 255, 40 L. Ed. 691, 697, 699,
>
> "These proceedings for the escheat of the estate of a deceased person for want of heirs or devisees, *like ordinary proceedings for the administration of his estate, presuppose that he is dead; if he is still alive the court is without jurisdiction, and its proceedings are null and void, even in a collateral proceeding.* * * *
>
> "*When a man dies* the legislature is under no constitutional obligation to leave the title to his property, real or personal, in abeyance for an indefinite period; but it may provide for promptly ascertaining, by appropriate judicial proceedings, who has succeeded to his estate. If such proceedings are had after actual notice by service of summons to all known claimants, and constructive notice by publication to all possible claimants who are unknown, *the final determination of the right of succession either among private persons, as in the ordinary administration of estates, or between all persons and the state, as by inquest of office or similar process to determine whether the estate has escheated to the public, is due process of law.*"

These proceedings, and others of like character—*administration* proceedings—are entrusted to tribunals of a peculiar nature, and involve the exercise of "merely *prerogative* action". They do not divest—they initiate titles. They involve considerations entirely different from, and have no analogy or resemblance

> *"to the exercise of the ordinary judicial power, in dealing with litigated questions affecting persons not subject to the exercise of prerogative jurisdiction, and entirely sui juris."*
>
> *Detroit, L. & N. R. Co. v. Probate Judge,* 63 Mich. 676; 30 N. W. 598.

There are other determinations of like character, acting *in rem,* and concluding every body as to the fact declared. For example: the declaration that Cuba is a republic; the declaration of the validity of the organization of a municipal corporation, and so on. None of these prerogative determinations interfere with vested rights.

We do not, of course, intimate that, under special constitutional provisions, the state courts may not be given an administrative jurisdiction.

> "In speaking in this connection, and elsewhere, of the action as *necessarily* prompted by a wrong, special proceedings *not antagonistic in their nature, and where the action of the court is as much administrative as judicial, are not referred to."*
>
> *Bliss, Code Pl.,* p. 192.

We do contend that any proceeding that can have force to conclude adversary rights of property, is either an action at law, or a suit in equity.

See, *ex parte Howard,* 9 Wall. 175.

> "The criterion must be whether the proceeding is commenced as the code declares an action shall be commenced—for instance, by summons or warrant, issued in a form, if any, therein provided, or by voluntary appearance—*and is between parties, with issues presented by the pleadings which the code requires in actions.* If it is of such a character the proceeding is an action; if not, and yet a remedy and not a mere proceeding in an action, it is a special proceeding."
>
> *Cyc.*, Vol. I, p. 721.

By "special proceedings", when non-adversary in character, the state constitution intends that class of proceedings in which prerogative power is exercised after a *quasi* judicial inquiry. For convenience this administrative jurisdiction is conferred upon the local courts. The mere fact that the jurisdiction is exercised by a court, does not, it is obvious, make the proceeding judicial.

Tregea v. Modesto, supra.

As a result of such administrative proceedings a right is either granted to or withheld from the petitioner, which right the state, in the exercise of its prerogative power, is competent either to grant or withhold.

Proceedings like that under the "Wright Act", Statutes 1897, page 254, to determine the validity of the formation of irrigation districts; that under Section 4, Statutes 1903, page 3, for ascertaining the validity of the dissolution of irrigation districts; that under Section 58, Statutes 1903, page 291, relating to drainage

districts; are sufficiently distinguished in the *Tregea* case.

Such proceedings, while not strictly judicial, and consequently not binding as *res judicata,* are undoubtedly conclusive in so far as concerns merely the *status* of the *quasi* municipal corporations; for this also is a political and prerogative determination. They can not be permitted, however, to divest property rights, and do not purport to do so.

Can a legislature alter the whole frame and substance of law and equity and by a mere fiction and form of words accomplish results not to be tolerated in the jurisprudence of law or equity? Law and equity deal with the adversary rights of property; their basic principles are firmly established by the federal Constitution. It is contrary to the genius of law or equity to pass upon rights of persons not before the court. Very well, then, it is said, we will not call it an action at law or in equity, but a "special proceeding".

Although the very reason and basis for the course of law and equity is that conflicting rights of property can not be examined, compared, weighed and adjudicated unless they are brought into opposition by issues presented to the court and by the disclosure of an adversary who may be served with notice in order that there may be an opportunity for debate, yet by calling it a "special proceeding", it is in effect said, we get rid not only of law and equity, but of the reasons and necessities that lie beneath and behind law and equity.

The federal courts have no difficulty in distinguishing between proceedings that are strictly judicial and therefore competent to divest ordinary rights of property, and proceedings that involve the exercise of mere prerogative power.

Upshur County v. Rich, 135 U. S. 467;
In re Pac. Ry. Commission, 32 Fed. 241;
In re City of Chicago, 64 Fed. 897.

A SUPREME TEST OF THE CHARACTER OF THE PROCEEDING AUTHORIZED BY THE McENERNEY ACT IS FOUND IN THE ANSWER TO THE INQUIRY: CAN IT BE INSTITUTED IN AND APPLIED BY THE FEDERAL COURTS AS AN ACTION INTER PARTES? IF IT CANNOT, IT IS BECAUSE IT IS NEITHER AN ACTION AT LAW OR IN EQUITY. IT IS IMPOSSIBLE TO CONCEIVE THAT THE STATE HAS POWER TO CREATE AN ACTION WHEREBY ADVERSARY PROPERTY RIGHTS MAY BE DETERMINED, WHICH ACTION, WHERE DIVERSITY OF CITIZENSHIP IS PRESENTED, CAN NOT BE ENTERTAINED BY THE FEDERAL COURTS. TO ADMIT SUCH A POWER IS TO DENY THE JURISDICTION GIVEN BY THE CONSTITUTION TO THE FEDERAL COURTS AND TO DEPRIVE SUITORS ENTITLED TO APPLY TO THOSE COURTS OF THE EQUAL PROTECTION OF THE LAWS.

Can the proceeding authorized by the McEnerney Act be instituted in and applied by the federal courts?

Can there be a removal of the proceeding to the federal courts?

Can a writ of error be issued from this court to the California court in a proceeding in which there is no adversary party?

Can an ambassador or a consul, as plaintiff, institute in this court a proceeding under the act?

These questions are not only clearly answered by reason but also by the unequivocal authority of this court.

The federal courts will not, whether in the exercise of their original jurisdiction, or of their appellate jurisdiction, or on removal, depart from that most fundamental and universal maxim of jurisprudence that no court of judicature can give a sentence divesting the rights of property of a person not in court and whose name and claim of right are not even suggested in the pleadings. We are not now merely reiterating the principle stated by Lord Romilly in his judgment in the House of Lords (L. R. 1 Scotch App. 117) that

> "*res judicata* signifies that the court has, after argument and consideration, come to a *decision* on a *contested* subject",

nor are we again justifying what the Supreme Court of California calls the "observations" of Justice Brewer in giving the decision of this court in the Tregea case (164 U. S. 179); "observations" that were the very essence of the decision, which was that a writ of error lies only to a *judgment;* that only a *judgment* can be *res judicata,* and that the action of the California court in the confirmation proceeding could not be considered a judgment because it was not, to use the words of Lord Romilly again, "a decision on a contested subject".

Suppose that a petition under the McEnerney Act is filed in the Superior Court by a citizen of California and that by chance a citizen of another state gets notice,

appears and "makes himself a party by pleading to the complaint" as the act provides. There is then for the first time a "case" presented and the "case" is seemingly cognizable by the federal courts on removal; there is, in truth, a controversy between citizens of different states, and the controversy ought, under the constitution and statutes of the United States to be removable to the federal courts,—and it *would* be removable if it were a case of which a court of law or equity—a court of judicature—could take cognizance.

The case of *O'Callaghan v. O'Brien,* 199 U. S. 89, illuminates the whole subject, and, better than any case we know, points the distinction between the exercise of merely prerogative jurisdiction and the jurisdiction of law and equity. The question was whether the federal courts, as courts of law and equity—courts of judicature—whose powers are strictly judicial—which have not, as probate courts have, a prerogative, administrative, non-contentious or voluntary jurisdiction—could entertain, on the ground of diversity of citizenship, jurisdiction of a *controversy* requiring adjudication concerning rights to the estates of decedents.

It was regarded as settled law,

> "That where a state law, statutory or customary, gives to the citizens of the state, in an action or suit *inter partes,* the right to question at law the probate of a will, or to assail probate in a suit in equity, the courts of the United States, in administering the rights of citizens of other states, or aliens, will enforce such remedies."

This is, of course, upon the principle *that where there are contested issues,*

> "the cases arising in that (the probate) court are eminently those of chancery jurisdiction."
>
> *Reed v. McCormick,* 4 Cal. 342.

In the O'Callaghan case this court had, therefore, to consider whether the proceeding authorized by the Washington statute (the property being *in custodia legis* of that state), was a proceeding of which a court of judicature could take cognizance. The Washington statute provided (and there can be no doubt of its power so to provide with reference to the estate of a decedent) that the decree, entered in a contest as to the validity of a will, should "inure not only to the benefit of the particular contestant, but" should "be operative as to the whole world".

It was necessary, therefore, to consider whether the proceeding was "an action or suit *inter partes*". The court said:

> "The only dispute possible under these propositions may arise from a difference of opinion as to the true significance of the expression 'an action or suit *inter partes*', as employed in the second proposition. When that question is cleared up *the propositions are so conclusively settled by the cases referred to that they are indisputable.*"

In holding that the proceeding provided for was not an "action or suit *inter partes*" it was said (p. 115):

> "Moreover, *it is evident* that the statute contemplates that the court, when acting on a contest filed under its provisions, **is not confined to the exertion**

of powers which would properly be exerted in an ordinary suit inter partes, since the statute causes a decree in favor of the petitioner, revoking a will already admitted to probate, to inure not only to the benefit of a particular contestant, but to be operative as to the whole world."

It was accordingly held that the federal courts can have no jurisdiction, *even where there is a diversity of citizenship as between contesting parties.*

Now, it is plain that since the federal courts *have* jurisdiction in all cases *inter partes* involving rights of property, as part and parcel of their law and equity jurisdiction, and since these courts are by the above case held to have *no* jurisdiction where the judgment is to bind persons not parties—such not being an "action or suit *inter partes*",—**it follows that even where there is a contest between two or more persons concerning property rights, the case is not one cognizable by a court of law or equity—a court of judicature—if the judgment therein required to be rendered is to have the effect of binding persons not parties. In other words, such a case is not one at law or in equity, and is properly entertainable only by a tribunal exercising prerogative power in cases where such power can constitutionally be exercised.**

When it is a question of the exercise of its sovereign prerogative by the state, whether in the distribution of the estates of decedents, or the collection of taxes, or the condemnation of property, it is quite immaterial, from the federal point of view, what method of procedure may be adopted. The state may adopt a purely administrative procedure if it so chooses, for the con-

stitution of the United States does not purport to curtail its powers in this regard, nor to create a tribunal to which an alien or a citizen of another state may resort for the judicial determination of such matters.

> "But notwithstanding the right is one that appertains to sovereignty, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance."

And *if* the state provides a proceeding that takes

> "the form of a proceeding before the courts **between parties**—the owners of the land on the one side and the company seeking the appropriation on the other —there is a *controversy* which is subject to the ordinary incidents of a civil suit, and its determination derogates in no respect from the sovereignty of the state."
>
> *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239.

If the state exercises its prerogative power by means of judicial proceedings the federal courts will be open to aliens and non-citizens. If, on the other hand, the state withdraws such matters from judicial cognizance there can be no federal objection.

But it is an entirely different matter when the question is whether A or B is the owner of property. *The determination of this question is not within prerogative power and has not been since Magna Charta (12 Coke's Rep. 63).* This right is protected by the constitution of the United States, and can only be devested by judicial power operating in accordance with the requirements of due process. The federal courts have jurisdiction to

determine this right, and they can not be deprived of jurisdiction by any state.

The framers of the federal constitution never contemplated that persons not parties would or could, with due process, be concluded by a judgment of a court; and, we submit, **by giving to the federal courts jurisdiction of controversies between citizens of different states, they forever put it out of the power of a state to determine property rights in a non-adversary proceeding, or to conclude the rights of persons not made parties.** They believed, as Chief Justice Marshall believed,

> "that no case can be adduced where any person has been considered a a party who is not made a party by the record",

and that the constitution of the United States is to be interpreted in the light of this maxim (*Osborne v. Bank*, 9 Wheat. 738, 850).

The federal constitution not only recognized this basic principle, than which there is none more deeply rooted in our institutions—the principle that ordinary rights of property (of persons *sui juris* and not subject to prerogative control) can only be devested by an action *inter partes*, and that no person can be concluded as to such rights unless made a party—the federal constitution not only, we submit, recognized this principle, *but upon it founded the jurisdiction of the federal courts.* It was never intended, and can not be tolerated, that a state should have power to create an action whereby ordinary rights of property may be devested and transferred to another citizen, which action, where diversity

of citizenship is presented, can not be entertained by the federal courts.

> "A state cannot, by any statutory provisions, withdraw from the cognizance of the federal courts a suit or judicial proceeding in which there is such a controversy. Otherwise the purpose of the constitution in extending the judicial power of the United States to controversies between citizens of different states would thereby be defeated." **"If this were possible, then the only thing the legislature of a state would have to do to destroy the right of removal entirely would be to simply change and modify the details of procedure."**
>
> *Madisonville Traction Co. v. Min. Co.*, 196 U. S. 239, 249, 253.

In the O'Callaghan case, *supra*, it was held:

1. That the jurisdiction of the courts of the United States (where there is the requisite diversity of citizenship) extends to all actions or suits *inter partes*, concerning property rights, whether the controversy arises out of the administration of estates or otherwise. Such cases are within the grant of law and equity jurisdiction.

2. **That the federal courts can have no jurisdiction even of a contest between parties if the effect of the judgment is to conclude the rights of persons not parties. Such power would not "properly be exerted in an ordinary suit inter partes".**

To our minds it seems obvious that the framers of the constitution were unable to conceive that a person not a party could, with regard to due process, be concluded by a "judgment" like that under the Mc-

Enerney Act, or that a "judgment" of this character would be entitled to faith or credit in the federal courts. If they had been able to conceive such a thing there can be no question but that they would have invested the federal courts with the peculiar jurisdiction countenanced by the decision of the Supreme Court of California. They would not have left it so easy for the state utterly to defeat the federal jurisdiction in cases of diverse citizenship.

If the act had expressly provided that no case arising thereunder should under any circumstances be triable in the federal courts it can not be doubted that it would be declared void. It is the necessary effect of a statute that determines its constitutionality—not what it expresses.

Brown v. Maryland, 12 Wheat. 419.

The basis of the decision of Supreme Court of California is that the *res* is within the territorial jurisdiction, and subservient to the sovereignty of the state. In such cases, it seems to be urged, due process does not apply. In what cases, then, does due process furnish protection? Under Magna Charta was it property situated in France of which the Englishman could not be deprived except by the "law of the land"? Was it to persons in Turkey that trial by jury was guaranteed? Has it ever before been argued that the property of which California may not deprive a citizen without due process is property in Nevada—that the constitution does not refer to property in California because that is a *res* within the jurisdiction? According to this theory

the only property protected against arbitrary power is property to which that power can in no case reach.

The fact that the *res* is within the territory is material in considering the principles of territorial sovereignty, but can have no other relevancy to the construction of a domestic or federative constitution. If, by reason of its sovereign power over a piece of real property, a state may conclude the rights of persons not parties to the proceeding, it may do the same thing in a proceeding respecting personal property. In ejectment, in replevin, in trespass, in attachment, *in any case whatsoever involving the question of title to property real or personal*, the legislature may consider it expedient that the judgment therein shall give an absolutely good title against all the world, whether the persons to be concluded are before the court or not, and regardless of the fact that neither their names nor their claims are stated. In "all the world" citizens of other states are included. If these citizens of other states should happen to come into the state court and remove the case to the federal court, they will be told that although there is the requisite diversity of citizenship, and although under the constitution and statutes of the United States they are entitled to have their property rights determined by an impartial tribunal, yet, inasmuch as it is not proper for a court of judicature to render a "judgment", the effect of which is to bind the rights of persons not parties, the proceeding will not be entertained. If it can be provided by a state that the judgment in one proceeding, involving rights to property, real or personal, within the territorial jurisdiction, shall be binding

upon persons not parties, it can be so provided in all cases involving property rights, *and the remedy can be made exclusive.* If provided by one state, it may be so provided by all. And if, and in so far as thus provided, an alien or a citizen of a different state will be unable to have his claim to property adjudicated in the courts whose jurisdiction it is his constitutional right to invoke.

Is this the "accordant jurisprudence" of the state and federal courts in cases of diversity of citizenship? Is this the harmonious working of our federative system?

The federal jurisdiction is the same in every judicial district of the nation, from Florida to Oregon and from Maine to California. Local expediencies, it may be confidently asserted, will not avail to weaken a thread of its fabric.

Will this court undertake to say that a proceeding which is not "a case at law or in equity", which is not *inter partes,* which discloses no controversy, which names no defendant, which is designed to devest private rights in land, which operates to conclude property rights of non-citizens, and which nevertheless is so devised as to deprive the non-citizen of his constitutional right to a trial in the federal courts, is not effective to defeat the federal jurisdiction and consequently in violation of the federal laws and constitution?

Can the result be permitted or tolerated? Will it not rather be held that in cases not properly involving the summary exercise of the prerogative power of the state

—in cases where ordinary rights of private property are in question—the constitution of the United States gives full recognition to the principle that the rights of A can not be divested for the benefit of B except by a strictly judicial proceeding in which are "actor, reus, judex, regular allegations, due notice"—an adversary suit or action *inter partes,* in which the judgment is conclusive only as to the rights of persons made parties by the record—that is to say, "proceedings of law upon a cause"?

3 How., St Tr. 152.

It seems very clear that there has not been and can not constitutionally be, a sentence strictly *in rem* except in the exercise of prerogative power in matters entirely outside the accustomed jurisdiction of the constitutional judicature.

THE ACT CAN NOT BE SUSTAINED AS ANALOGOUS TO THE COMMON LAW FINE.

The Supreme Court of California says that "*in a way*" the McEnerney Act procedure "is analogous to the common law fine". It can, as we believe, be briefly and specifically shown that the common-law fine was as far removed from the McEnerney Act in principle as it is in time.

A fine was a method of conveying land and putting the conveyance on the records of the court. The person to whom the land was to be conveyed commenced an action against the other, generally on an alleged breach

of the covenant to convey. The defendant acknowledged the right of the plaintiff and the acknowledgment was entered on the records. **Just as in other cases the record itself bound only parties and privies.** If, however, proclamations were made, the period of the statute of limitations was shortened to five years, but, as is usual in statutes of limitations, persons under disabilities were not required to make their claim until five years after disability removed, and in no case did the statute commence to run until the right accrued. **So far as strangers to the suit were concerned it was only the statute of limitations that cut off their claim.**

> "The statute of fines was a short statute of limitations; but although short, it was not arbitrary. * * * It was not content with a *mere* adverse possession. While it abbreviated the slumber, *it increased the solemnity and frequency of the warning.*"
>
> *McGregor v. Comstock,* 17 N. Y. 169.

Further, in the case of fines, a claimant was not compelled to come into a fictitious suit of the existence of which he was unaware. He could himself, seeing his land adversely possessed, institute any action known to the law to try the right; he could enter upon the land; he could make continual claim; or he could enter his claim on the record of the fine.

3 Bla., 355, note (k).

Furthermore, at any length of time it was open to him to show that the fine was void as not having been levied by a person having such an estate as would support it. And if one not having the fee assumed, never-

theless, to levy a fine, he was liable to forfeit even the estate he in fact had.

> "In order to make a fine of any avail at all, it is necessary that the parties should have some interest or estate in the lands to be affected by it. Else it were possible that two strangers, by a mere confederacy, might without risk defraud the owners by levying fines of their lands; for if the attempt be discovered, they can be no sufferers, but must only remain in *statu quo;* whereas if a tenant for life levies a fine, it is an absolute forfeiture of his estate to the remainder-man or reversioner, if claimed in proper time. *It is not therefore to be supposed that such tenants will frequently run so great a hazard;* but if they do, and the claim is not duly made *within five years after their respective terms expire,* the estate is forever barred by it. Yet where a stranger, whose presumption cannot be thus punished, officiously interferes in an estate which in no wise belongs to him, his fine is of no effect; and may at any time be set aside (unless by such as are parties or privies thereunto) by pleading that *partes finis nihil habucrunt.'* And even *if a tenant for years,* who hath only a chattel interest, and no freehold in the land, levies a fine *it operates nothing,* but is liable to be defeated by the same plea."
>
> *3 Bla.,* 356-7.

The fact is, therefore, that by fine and non-claim the common law arrived at a result no different from the result reached by the California five-year statute of limitations before the McEnerney Act was heard of, the only practical difference being, that, by the proclamations, the common law dealt more tenderly with rights than did the California law even prior to the McEnerney Act. Fine and non-claim cannot, therefore, be cited as anything

other than a conspicuous example of the justice of the common law which would not tolerate even a short statute of limitations without carefully safeguarding its operation.

In

Lord Portsmouth v. Vincent, 1 Sch. & Lef. 380,

tenants at will in possession under a letting by a receiver in the court of chancery, were by the neglect of the parties in the cause suffered to remain in possession for a great number of years, and not called on for rent; they levied fines and insisted on them as a bar; but Lord Hardwicke held:

> "No, you gained possession as tenants under the receiver of the court, you gained that possession in confidence, **and you shall not by means of that possession defeat the title of the persons for whom you had the possession."**

This principle is destroyed by the McEnerney Act.

In

Smith v. Packhurst, 3 Atk. 135,

in the House of Lords, it was held that though a fine levied by a tenant for years could not bar the reversioner, it would operate by estoppel, and therefore bar the parties thereto and their privies. It was also held that the tenancy for years thereby became forfeited (pp. 140-1).

In

Brereton v. Gamul, 2 Atk. 240,

the title set up by the plaintiff was, **precisely as in the case now at bar,** a right to a reversion in fee expectant upon the determination of a lease for 99 years.

The tenant had levied a fine and there had been more than five years' non-claim. Lord Chancellor Hardwicke said:

> "If the plaintiff has lost his right by a legal bar, he can have no remedy; but his case as stated by the bill, and not at all denied by the answer, is of such a nature as intitles him to all the favour that this court can shew him. **It would be of dangerous consequence to admit of such practice as appears in this case;** for nothing is more common than long terms of years with a small rent reserved, and it very frequently happens those who claim under the original lessor, from the length of the term, become quite ignorant of their title. * * * **Tenant for years, at will, or at sufferance, can not, by fine, devest an estate, and turn it to a right."**

In

Pomfret v. Windsor, 2 Ves. Sen. 472,

it was held that a fine by persons in possession, and non-claim, the legal estate being in trustees, did not bar an equitable charge under a deed of trust, though a great length of time had elapsed. The Lord Chancellor said (pp. 481-2):

> "Besides those general cases aforesaid, there is *Focus v. Salisbury, Hard.* 400, in which the opinion of Lord Hale as to the privity between lessor and lessee, where the fine should not bar, is very material to this, he comparing that case directly to a mortgage; and here is as much privity as can be. This then has clearly no operation in point of law; and indeed the acts subsequent to the fine explain it to the contrary, and shew it was not the intent of the parties to the fine to disseise or bar the trustees, viz. the private act of parliament obtained after the fine by Lord and Lady Windsor for an execution of this trust, and the decree in

a suit to which they were parties, and did not complain thereof. All these cases amount to the cases put in Farmer's case, where the paying the rent was held evidence of no disseisin of the lessor, as paying the rent admitted possession of the lessor. I agree to what the defendants insist on, that the purchasers coming in since ought to have the full benefit of the operation of this fine; but they cannot have more than the operation of it. *As this fine was a nullity at first, nothing arising from length of time can make it good; and non-claim on a void fine amounts to nothing, has no effect at all.* There is no difference in that respect from length of time; but in cases where the fine was good in its original, and the parties to be barred by the fine have different times to enter, there is a prolongation of the fine for that purpose in the case of fines; as in a fine by tenant for life, which as soon as levied operates a forfeiture, and the remainder-man or reversioner may enter presently, but is not bound so to do; *and therefore the law gives him five years after the death of the tenant for life, because he has no reason to look until the natural determination of the estate;* but I know no other cases, in which the law will give different times of entry on non-claim on the foot of fines. I will go still farther; that if this had been a bar in point of law to all intents and purposes, it would be none in equity (a fine no bar where a bill for relief has been filed; *secus* for discovery. 1 Brown, 289); my reason is this: *Lord and Lady Windsor were in nature of mortgagors of this estate;* continued in possession just on the same foot as a mortgagor continues in possession, before mortgagee enters, who may enter on him at any time. *This incumbrance has the effect of a mortgage; then it is a certain doctrine in this court, that a fine by mortgagor in possession, cannot bar mortgagee;* and that is the case put before-mentioned by Hale. The case of this fine is still stronger than almost any that can be put, for this particular

reason, Lady Windsor, who levied the fine, *was in the nature of trustee* of this very sum of £20,000 which was the charge; for executors and administrators to many purposes, though not to all, are in this court considered as trustees. She was administratrix to her late husband, and guardian to her infant daughter; both which capacities, the administratorship and more strongly the guardianship, infer a trust. She was intitled to the £20,000 to pay debts and distribute the surplus; two-thirds of which to her infant daughter, to whom she was guardian. *Then being trustee of this very fund, she does an act, which is insisted on to be bar and extinguishment of this trust of hers.* On this foundation therefore, supposing the fine good in law, this court ought not to stand by and suffer a fine, levied by such person, to bar the equitable right creditors had to this fund for payment of debts, and also the infant's; for suppose, the creditors wanted the residue of this sum to pay them, **this court would not suffer it to be said, they should not come against the estate because of this fine levied by her; it would be absurd; and if a practice of this kind was suffered to prevail, a court of equity might as well be abolished by act of parliament."**

Is not this the language of due process? What ground can there be for holding that proceedings such as those under the McEnerney Act can, with any regard whatever to due process, bar mortgages, and trusts, or convert, as in this case, a leasehold estate into a fee? It is, indeed, we submit, a far cry from the legitimate and constitutional procedure of foreign attachment, or fine and non-claim, to the absurd and shocking process of the California statute.

THE ACT CAN NOT BE SUSTAINED AS A STATUTE OF LIMITATIONS.

The argument that the act may be sustained as a statute of limitations is based upon a *dictum* of the Supreme Court of California, contained in *Hoffman v. Superior Court,* 151 Cal. 386 at page 393, as follows:

> "The provisions of section 473 of the Code of Civil Procedure apply in such cases. Any person interested in the property and having no actual notice of the decree, may come in at any time within a year after its rendition, and by showing that he has not been personally served with process, and stating facts constituting a good defense to the proceeding,—that is, facts sufficient to show that he has a valid adverse interest in the property,—he may have the decree vacated as to him and be allowed to answer to the merits."

The Hoffman case, as has already been noticed was an application for a writ of mandate to compel the Superior Court to exercise jurisdiction under the act. This the Superior Court had refused to do because the affidavit did not contain a showing of any effort to ascertain claimants.

The brief for the petitioner said:

> "The sole question to be determined by this court is whether the language contained in the affidavit was sufficient to give the lower court jurisdiction of the action."

The brief for Judge Murasky, the respondent, presented no argument as to the applicability of section 473 of the Code of Civil Procedure: the question was obviously not before the court or in the minds of counsel.

Certainly the obiter dictum can have no weight with this court.

Carroll v. Lessee, 16 How., 275.

It is to be noticed too, that the California court did not give any reason whatever for its bare observation that "the provisions of sec. 473 of the Civil Code of "Procedure apply in such cases". It is natural that no reasons were given—the matter was neither argued nor involved. It is, we think, very clear that no sound reason supporting the dictum can be advanced. The third clause of section 473, C. C. P. (the clause in point here) provides that

> "When from any cause the summons in an action has not been personally served on the defendant, the court may allow, **on such terms as may be just,** such defendant or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action."

How this section of the code can be applicable to the McEnerney proceeding does not appear from the dictum in the Hoffman case. It is true that by section 12, the act provides that

> "*Except as herein otherwise provided,* all the provisions and rules of law relating to evidence, pleading, practice, new trials and appeals applicable to other civil actions shall apply to the actions hereby authorized."

But section 473, C. C. P., *is* inapplicable for the sufficient reason that it *is* "otherwise provided", in language most apt and fitting to exclude this particular provision.

> "At any time within three months from the first publication of the summons, or within such further time, *not exceeding thirty days*, as the court may, for good cause, grant, any person, etc., may appear and *make himself a party to the action.*" (sec. 8),

and then the judgment is declared (sec. 11) binding and conclusive upon *all persons, whether a defendant or a party to the action or not.*

It would be an unwarranted imputation upon the legislature that adopted this phraseology, to say that it intended section 473 of the Code of Procedure to be taken as a part of it.

Writing that section into the statute would make it read:

> "At any time within four months from the first publication, any person, known or unknown, served or unserved, may appear and make himself a party by pleading. But after four months, even for good cause shown, the court cannot allow him to do so; but if he has not been personally served, the court may allow him, at any time within fifteen months after first publication, to appear and make himself a party by pleading."

The plain meaning is that the absolute right to appear and become a party is limited to three months from the first publication, and *that* without any regard to personal service.

In regard to the extension of that time, *all discretion is taken away from the court after thirty days more.* It is inconceivable and wholly inconsistent to couple with that provision a right to appear and become a party within fifteen months, even if confined to those not

personally served. It would be absurd to limit the *discretionary* opportunity to appear and become a party, of parties not served, to one month, and in the same statute give to such parties a right to appear and become parties within fifteen months; or, to say that such a party, if he comes within one month, *must* be kicked out of court before judgment, and if he comes after judgment and within fifteen months, *must* be allowed to appear and plead "on such terms as may be just". This would be to construe the statute as taking away the discretion of the court to allow an appearance after four months, while retaining it during the full period of fifteen months.

Certainly this court cannot believe that when the point is involved, presented and argued, the California court will hold section 473, C. C. P., to be applicable.

But suppose it were applicable, what possible bearing could it have upon the constitutional question here presented?

We have shown that the common law fine is in no sense analogous. At common law, if a fine had been levied by Zeiss, it would have been *absolutely void* because he was our tenant; and non-claim for any length of time whatsoever would amount to nothing, would have "no effect at all". Further, in any case of a reversionary estate, the five-year period of non-claim did not commence to run until the determination of the estate; that is to say, in the present case, even if the justice of the common law could have tolerated a fine levied by Zeiss, our interest would not be barred by

non-claim until 1955, and then only by uninterrupted adverse possession, under the fine, for we would have no "reason to look until the natural determination of the estate".

Pomfret v. Windsor, 2 Ves. Sen. 472, 481-2.

We cannot follow the reasoning that would, in any case, make of section 473, C. C. P., a statute of limitations in any constitutional sense. The statute does not purport to give the decree efficacy by reason of an adverse possession held thereunder, nor in the present case does it appear that Zeiss has been in adverse and uninterrupted possession under the McEnerney decree. *He relies upon the decree as such* and not upon adverse possession, or any statute of limitations in connection with the decree or otherwise.

The argument really harks back to certain suggestions contained in *People v. Simon,* 176 Ill. 165, but fails to notice the limitations and qualifications put by the court itself upon these suggestions. There it was said, after noting that the Torrens Act provided that the decree entered thereunder should, after the expiration of two years, be "forever binding and conclusive upon all persons";

> "This provision seems to attempt to make a decree binding upon persons not parties to the suit, and, if given effect literally, would deprive persons of vested rights without due process of law. *A limitation may be placed upon the time within which a person who has a mere right of action shall bring it, but 'limitation laws cannot compel a resort to legal proceedings by one who is already in the complete enjoyment of all he claims':* Cooley's

> Constitutional Limitations, 366. To the extent that the act attempts to transfer property without due process of law it cannot be upheld. *On all parties to the suit properly before the court the decree may, after the lapse of two years, become conclusive and forever binding, and as to all who have merely a right of action the expiration of two years may complete the bar.*"

In other words, it was not the decree, but possession under the decree that bound persons not parties; and even then only those persons were bound against whom adverse possession could, in the nature of things, be available.

It is this same principle that Justice Loring had in mind when he said that it might be constitutional to determine the rights of parties properly before the court by force of the decree itself, and that the rights of strangers might be barred by possession under the decree, for

> "if that possession continue unbroken, and the decree setting up the applicant's title remain in force unmodified for a specified time, all the world should be barred".

Even if section 473 were applicable to the McEnerney proceeding, and even if a case in any respect analogous to a statute of limitations were presented, the statute could not be upheld. Section 473, C. C. P. (in the cases to which it is applicable), authorizes a judgment to be vacated within the time limited **"on such terms as may be just".** This provision alone is controlling and conclusive. Before it is even worth while talking of a statute of limitations, it is necessary

to assume that the right, within the time, is absolute and unconditional.

What would be thought of a statute providing for personal service of a summons—not to appear, answer and be heard; but providing that the party summoned might apply within a given time and that the court "might allow him to appear *on such terms as might "seem to be just"*? The very terms and conditions imply discretion and discretionary action on the part of the court. But even if this were not so, the statute could not be upheld as a statute of limitations or as conforming to the due process of the common law, as exemplified in the case of a fine. There the right given was to litigate the right *unconditionally and just as if the fine had not been levied; and that uncovenanted, unconditional right was of the substance and essence of due process in such cases.* No statute of limitations was ever enacted or upheld which only left to the party affected the right to move to vacate a judgment, of the existence of which he was ignorant, by permission of a court, given on such terms as might seem just. Further, as has already been noted, tenants, trustees, mortgagors, and lienors were not permitted, and can not now constitutionally be permitted, to start the running of a period of non-claim with no notice of a change in the character of their possession.

In any event, mere lapse of time, whether before or after judgment cannot be efficacious in the absence of notice. Adverse possession does, of course, give notice, but the rendition of a judgment without notice has no

more tendency to inform individuals that their rights are to be affected, than has the filing of pleadings without notice.

A conclusive answer to the contention that section 473 is of moment in a McEnerney proceeding is the decision of this court in

Roller v. Holly, 176 U. S. 398.

Although the judgment therein held to be void would no doubt have been vacated and the defendant permitted to come in and defend, it was said,

> "but that would be a matter of discretion—a contingency he was not bound to contemplate. The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion" (see p. 409).

The Texas Code (Sayles Civ. Stats., Art. 1375) permitted the judgment to be vacated within two years.

THE PROCEEDING PROVIDED FOR BY THE ACT IS NOT AN ACTION IN REM IN THE SENSE THAT IT MAY CONSTITUTIONALLY CONCLUDE THE RIGHTS OF THIRD PARTIES.

> "It is better to distinguish between proceedings *in rem* and proceedings *quasi in rem.* The latter * * *" are "only conclusive between the parties."
>
> *Black on Judgments,* Sec. 793.

> "Is every action in which a specific article is demanded a proceeding *in rem?* If it were, a writ of right which demands lands, of detinue which demands a personal chattel, would be a proceeding *in rem,* to which all the world would be parties, and by

which the rights of all the world would be bound. *But this, all know, is not the law.*"

Marshall, C. J., in *Mankin v. Chandler*, Fed. Cas. No. 9030.

Actions *quasi in rem*

"differ among other things from actions which are strictly *in rem* in that the interest of *the defendant* is alone sought to be affected, that citation *to him* is required and that judgment therein is *only conclusive between the parties.*"

Field, J., in *Freeman v. Alderson*, 119 U. S. 185.

"It did not observe the distinction, as old as the common law itself, between a proceeding strictly *in rem*, where such notice would be good, and a proceeding *quasi in rem*, a proceeding *against a person in respect of a res*, in which latter, as Mr. Justice Field said, * * * *citation to the individual defendant is required.*"

Hill v. Henry, 66 N. J. Eq. 150; 57 Atl. 554.

In discussing the point that the act under consideration confers upon the California courts power not judicial in its nature, that property rights cannot be divested except in a judicial proceeding, and that the so called "judgment" in the proceeding under the California act can not be admitted as *res judicata*, we call attention to the fact that no adversary need be designated and no adverse claim alleged by the complaints framed thereunder.

An action, the purpose of which is to determine title, has never been considered an action *in rem*. Has the ownership of property anything to do with the *status* of that property? In such action is the thing itself in any

manner passed upon? Is the property held, as in actions *in rem,* to be subject to an obligation, distinct, apart from and entirely irrespective of any question as to who owns it? Is the proceeding in any sense against the property, or against the owners, whosoever they may be, to satisfy an obligation for which they are liable by mere virtue of their ownership?

Where property is within the territorial jurisdiction of the court, *and where some designated person is alleged to assert a claim to that property adverse to the plaintiff's right* a case *requiring* judicial action is presented. If the adverse claimant resides out of the jurisdiction, or if for any other good reason he can not be personally served, the necessities of the case demand, and the purposes of justice require, that the validity of his adverse claim be nevertheless adjudicated. Under such circumstances constructive service is, *ex necessitate,* permitted. The rule is based upon no idea of *expediency:* it rests upon the *necessities* of the case. This does not mean and never has been held to mean anything else than that where a plaintiff presents his case to the court, alleging a right *and a specific violation of that right by a designated defendant,* the court will give a remedy if there is property within its reach upon which its judgment can act. But in all such actions, *quasi in rem,* there are *actor, reus, judex,* a reasonable notice, and all the essentials of due process. The judgment is always against the person specifically designated as defendant, and charged by the pleadings, and it binds only him and his privies. The seizure of the property by the court

"is only a means of bringing the debtor within the jurisdiction of the court by retaining the thing in place of bail *in redditum* because the property under attachment *is never condemned as in delicto and only responds collaterally to the judgment obtained against the owner.*"

Cole v. The Brandt, infra.

It is a mere question as to conflicting claims of title. In no such case will any charge upon or claim against the land be satisfied out of it. The action is not against the land in any sense. If no adverse claim exists (the complaint under the California act need allege none and in the case now under consideration did not allege any), then the action is no action at all. It is neither against a person nor against the land. Even when an adverse claim exists and is alleged, the action is, in all reason, not against the land, but against a person with respect to a claim of personal interest in the land. It is not an action *in rem,* but an action *de re.* As said in the lucid opinion in

Hill v. Henry, 66 N. J. Eq. 150; 57 Atl. 554,

it is an action "*against a person in respect of a res*".

In

Mankin v. Chandler, 2 Brock. 125; Fed. Cas. No. 9030,

the court had to consider whether a decree on foreign attachment was a judgment *in rem* and therefore binding upon an assignee without notice. The judgment was held not binding.

Said Marshall, Circuit Justice:

> "The whole inquiry, is, to which class of cases does that under consideration belong? What is the *nature* of a proceeding *in rem?* And in what does its specific difference from an ordinary action consist? Is every action in which a specific article is demanded a proceeding *in rem?* If it were, a writ of right which demands lands, of detinue which demands a personal chattel, would be a proceeding *in rem,* to which all the world would be parties, and by which the rights of all the world would be bound. *But this, all know, is not the law.*"

In

> *Cole v. The Brandt,* 1 Betts D. C. Ms. 36; Fed. Cas. No. 2978,

the question arose as to the effect of a judicial sale of a ship at St. Croix, arrested in an action upon a debt owed by the owner, as against a mortgagee who was not named as a party and who did not appear in the proceedings.

Said Betts, District Judge:

> "the acts before the tribunal at St. Croix have all the essential constituents of a legal procedure, *such as a charge or claim specified against the vessel,* her arrest therefor under the mandate of the court,—*notice to the master for all interested,* a hearing and adjudication upon the matter in demand, and the award of process commanding the sale of the vessel. * * * The local law undoubtedly authorized the attachment of the debtor's property in the first instance, to abide the judgment that might be rendered on the demand.
>
> "It is contended that the judgment when rendered effects a sequestration of the property seized and is thus conclusive against the vessel and all persons

having any interest in her. * * * This doctrine is incontrovertible in the jurisprudence of the United States in respect to actions involving specifically a condemnation of the thing arrested, but it is by no means definitely settled what constitutes a suit and judgment *in rem.* Without undertaking by any express terms of limitation to restrict that proceeding to one or another class of cases, it may be safely asserted that foreign attachments, though effecting a seizure of property in specie, are not regarded as proceedings *in rem.* This is sufficiently indicated by the tenor of the English and American cases upon that head, and is so expressly decided by the late Chief Justice Marshall. 2 Brock. 125 (Mankin v. Chandler), Case No. 9030. *Much less can an arrest of property initiatory to the action, for it is only a means of bringing the debtor within the jurisdiction of the court by retaining the thing in place of bail in redditum; because the property under attachment is never condemned as in delicto and only responds collaterally to the judgment obtained against the owner.* * * * I am of opinion * * * that upon the question of property the proceedings at St. Croix are not of a nature to convey a title to the claimant which can prevail against that in proof on the part of the libellant."

The reasoning of the above opinions is closely followed by the English Court of Appeal in

The Heinrich Bjorn, 10 P. D. 44,

although the decisions of Chief Justice Marshall and Judge Betts do not appear to have been noticed.

In consonance with the rule stated, it has been often directly adjudicated that a proceeding such as that contemplated by the California act is not an action *in rem,* in the sense of being binding upon the whole world, but an action *in personam,* and *that the legislature can not*

by a name alter its real nature and thus foreclose the constitutional inquiry as to due process.

In

State v. Guilbert, 56 Ohio St. 575, 47 N. E. 551,

the Supreme Court of Ohio, speaking to this very point, said:

> "Whether it is *in rem* or *in personam is determined by its nature and purpose. To say that the legislature may prescribe such notice as is appropriate to proceedings in rem, and thus invest the proceeding with that character, is to affirm its power to annul the constitutional requirement.* In this aspect of the case, and considering the effect of registration upon interests adverse to those of the applicant, *the proceeding to register does not, in any substantial respect, differ from a suit quia timet to settle title. It bears the least possible analogy to a proceeding in rem.*"

In

Bear Lake County v. Budge, 9 Idaho 703; 75 Pac. 614,

the court held unconstitutional a statute authorizing the defendants, in an action to establish water rights, to be described as "all claimants of a right to the use of the water", on the ground that such an action is not *in rem.* The language quoted from *State v. Guilbert* was adopted.

Mr. Black, in his work on Judgments, well says, at section 793:

> "Much of the uncertainty and confusion in the definitions of proceedings *in rem* has arisen from the attempt to make that term cover various classes of actions which are not strictly and purely *in rem,* although they exhibit some points of analogy or re-

semblance to the proceedings which fall within the narrower use of the phrase. It is better to distinguish between proceedings *in rem* and proceedings *quasi in rem.* The latter are assimilated to the former in some particulars,—as, in respect to the manner of acquiring jurisdiction,—but are not always attended by the same consequences—in respect, for example, of *the persons bound by the adjudication.* To make this more plain, we extract the following description of the two classes from a well-considered opinion of the United States Supreme Court: 'Actions *in rem,* strictly considered, are proceedings against property only, *treated as responsible for the claims asserted by the libelants or plaintiffs.* The property itself is in such actions the defendant, and, except in cases arising during war, for its hostile character, its forfeiture or sale is sought for the wrong in the commission of which it has been the instrument, or for debts or obligations for which by operation of law it is liable. The court acquires jurisdiction over the property in such cases by its seizure, and of the subsequent proceedings by public citation to the world, of which the owner is at liberty to avail himself by appearing as a claimant in the case. There is, however, a large class of cases which are not strictly actions *in rem,* but are frequently spoken of as actions *quasi in rem,* because, *though brought against persons,* they only seek to subject certain property of those persons to the discharge of the claims asserted. Such are actions in which property of non-residents is attached and held for the discharge of debts due by them to citizens of the state, and actions for the enforcement of mortgages and other liens. Indeed, all proceedings having for their sole object the sale or other disposition of the property of the defendant to satisfy the demands of the plaintiff, are in a general way thus designated. *But they differ, among other things, from actions which are strictly in rem, in that the interest of the defendant is alone sought to*

be affected, that citation to him is required, and that the judgment therein is only conclusive between the parties.' ''

The opinion of this court referred to by Mr. Black was delivered by Justice Field in

Freeman v. Alderson, 119 U. S. 185, 30 L. Ed. 372,

where it was held that an action to recover an undivided interest in real property and to obtain a partition thereof is, in its nature, a personal action, in which the judgment "binds only the parties in their relation to the property".

And to the same effect in

Hill v. Henry, 66 N. J. Eq. 150; 57 Atl. 554 (1904),

it is said:

"If, under legislative sanction, an incumbrancer should, in a foreclosure case, instead of naming individuals, describe the defendants as 'all persons claiming title to or interest in or lien upon the mortgaged property', and should allege that his was the prior lien, I should doubt very much whether a decree against such persons, described as a class and not as individuals, would be considered due process of law—would be regarded as entitled to full faith and credit—*even if a notice of the proceeding were served upon those within the jurisdiction and published against those without.* Its vice if any, would be that it did not observe the distinction, as old as the common law itself, between a proceeding strictly *in rem,* where such notice would be good, and a proceeding *quasi in rem, a proceeding against a person in respect of a res,* in which latter, as Mr. Justice Field said in *Freeman v. Alderson, supra,* citation to the individual defendant is

> required. There are very good reasons for observing the distinction. If the defendant be personally named in the order or notice of publication there will be more likelihood of his receiving actual notice. The pleading will inform him of what is alleged against him individually, and the decree will be definite and certain. It will be known who are bound and estopped by it."

It is only in

Tyler v. Judges, supra,

that language can be found suggesting a contrary view. There Justice Holmes, then Chief Justice of Massachusetts, tentatively proposed that a proceeding to quiet title can be made an action strictly *in rem. The other judges, however, even those concurring in the judgment, declined to place their decision upon that ground.*

The Chief Justice suggested that a proceeding *in rem* differs from a proceeding *in personam* chiefly in that the former is to bar "all who might be minded to make an "objection of any sort against the right sought to be "established"; in other words, that the legislature may, regardless of the nature of the rights involved, dispense with the giving of a real notice affording a substantial opportunity to be heard, by the simple device of calling the proceeding by one name rather than by another.

As indicated by Loring, and Lathrop, JJ., in their admirable dissenting opinion in the same case, *which, so far as this particular point is concerned, expresses the view of the court:*

> "Whether a particular proceeding is or is not a proceeding *in rem depends upon the character of the right in the res sought to be enforced, which is given*

by rules of substantive law, when the purpose of the proceeding is to enforce a right of property, and not to find an owner for property in custodia legis, as in case of a fund in court, the probate of a will, or an escheat for lack of heirs. *It does not depend upon the fact that the plaintiff undertakes to enforce an ordinary right of property in the res against all the world. The test is not, are all the world barred? but it is, is it a proceeding to enforce a liability for which the res is liable, irrespective of who owns it,—such a liability that the res can be properly impleaded as the respondent who is liable?* If it is, then a proceeding *in rem* lies, and all the world are barred; but if it is not such a proceeding, and is a proceeding to enforce an ordinary right of lien or of property only, the proceeding is not in its nature a proceeding *in rem*, and the legislature cannot make it so by providing that all the world shall be barred. To say that the test of a proceeding *in rem* is the fact that all the world are barred is to confuse cause and effect."

The Chief Justice further said:

"A ship is not a person. It cannot do a wrong or make a contract. To say that a ship has committed a tort is merely a short-hand way of saying that you have decided to deal with it as if it had committed one, because some man has committed one, in fact. There is no *a priori* reason why any other claim should not be enforced in the same way. If a claim for a wrong committed by a master may be enforced against all interests in the vessel there is no juridical objection to a claim of title being enforced in the same way. The fact that it is not so enforced under existing practice, affords no test of the powers of the legislature. The contrary view would indicate that you really believed the fiction that a vessel had an independent personality as a fact behind the law. Furthermore, naming the *res* as defendant, although a convenient way of indi-

> cating that the proceeding is against property alone, —that is to say, that it is not to establish an infinite personal liability,—is not of the essence. If in fact the proceeding is of that sort, and is to bar all the world, it is a proceeding *in rem.*"

If it were the fact that proceedings *in rem* do not arise out of, and bear no real relation to the substantial rights therein sought to be enforced, but are merely a baseless, though historically recognized, exception to the general rule that requires notice before condemnation, this would furnish no reason for altogether substituting the exception for the rule. Of course, it is not the fiction of the ship's personality that is the "fact behind the law". The fact that informs proceedings *in rem* is the fact that in all such proceedings the property out of which alone the obligation is to be satisfied must bear the charge quite without regard to any question or inquiry as to title or other personal interests therein. It matters not whether A is the owner or whether B has an interest, the lien must be discharged, or the tax paid. This fact makes it not only inconvenient but unnecessary that personal defendants should be designated or personally notified: further, as will be seen, this fact of itself makes the process of proceedings *in rem* both adequate and reasonable. As is agreed by all the cases, the notice provided by proceedings *in rem* is not empty form: it is solid substance.

We must not overlook the historical fact that at the maritime law *there was no personal liability of the owner* for the contracts or torts of his ship's master and that the only way to reach the case was by a proceeding di-

rected, in view of this doctrine of the substantive law, *in rem* against the ship. The principle is well stated in the masterly opinion of Judge Ware in *The Rebecca,* 1 Ware 187; Fed. Cas. No. 11,619, cited by this court in *Norwich Transportation Co. v. Wright,* 13 Wall. 104, as leaving "little to be desired on the subject".

There it is said that

> "The vessel was tacitly hypothecated by the obligations contracted by him" (the master), "both *ex contractu* and *ex delicto, but there resulted from them no personal liability on the owners.*" The ship and "freight, and *therefore indirectly* the owners, to the amount of the value of the ship and freight, are by the marine law bound."

And again:

> "*The owners were under no personal liability for the obligations of the master arising either ex contractu or ex delicto.* His contracts and torts bound their shares of the vessel, *but bound them no further.*"

What is more natural than that in such a state of the substantive law a proceeding *in rem* should be devised? There was no personal liability. Neither the owner nor any of his other property was responsible. The only action possible under the circumstances was an action against the ship. Even to this day it is not permissible in the admiralty to join the owner as a party to an action *in rem* against the ship (*Benedict, Adm.,* p. 384). Far from being mere form, this is a precise expression of the substantive law. See also "*The Laws of England*", Vol. I, p. 62. In that monumental work, edited and compiled

by the greatest lawyers of England, the theories of Justice Holmes as to the nature of proceedings *in rem* are mentioned and specifically disapproved. See Vol. I, page 61, note (u).

It is not possible that a proceeding devised to meet a substantial exception in a special case in the admiralty can now, for the first time in history, be held to furnish a precedent in a case not within the exception and to which no reasons arising out of the exception can apply.

An action initiated by a seizure or attachment of property *"ad fundandam jurisdictionem"* may, if you wish, be termed *"quasi in rem"*. But in so designating the action it will always be necessary to bear in mind in what respect it resembles an action *in rem* and in what respect it does not. It will always be necessary to define the meaning of the expression *"quasi"* as in such case used.

It may be agreed that actions *quasi in rem* resemble actions *in rem* in that by taking the property into its possession, either actually or constructively, the court so taking possession acquires jurisdiction *upon the claim alleged, as between the parties,* to sell or otherwise dispose of the property and adjust conflicting claims thereto. For such purposes and to this extent it is *as if* an action *in rem.* But as said by this court in *Freeman v. Alderson, supra:*

Actions *quasi in rem*

> "differ among other things from actions which are strictly *in rem* in that **the interest of the defendant is alone sought to be affected, that citation to him is required and that the judgment therein is only con-**

clusive between the parties;" and that "the judgment therein binds only the parties in their relation thereto."

Where ordinary questions of title are involved the conclusive character of the judgment *in rem* ceases, even in the admiralty. And so, in a prize case, although all persons interested are, by the citation, invited to come in and claim the property, and although a prize case is the most perfect proceeding *in rem* known to the law, yet if, in such a case, a decree of forfeiture be denied and it be adjudged that restoration be made to a claimant who had appeared and contested the attempted forfeiture, the decree so adjudging would not bind another claimant, with a superior title, who had not appeared in the case.

Cushing v. Laird, 107 U. S. 69.

As there said:

> " 'It is true, a general monition issues and this is considered notice to all the world, but though this be the construction of the law from the necessity of the case, **it would be absurd to infer in fact that all the world had actual notice, and, therefore, no superior claim to the one before the court could possibly exist.'** " Citing 3 Dall. 91.

This plainly points the difference between obligations for which the ship is liable irrespective of questions of ownership, and questions of title as between possible claimants.

So it is that the decree of a court of admiralty ordering the sale of a ship on petition of the master, although a decree strictly upon the *status* of the thing, passing

upon the question of its navigability, is not binding upon the property rights of anybody who is not heard.

The Tilton, 5 Mason 465, 474;
Darby v. Reid, 10 East 143.

And petitory suits in the admiralty, involving the title to ships, are never considered to be *in rem.* The persons to be bound must be made parties and served.

Benedict, Admiralty, p. 384.

The only case we can imagine where the determination of *status* might also operate to conclude conflicting property rights, is that of a slave who sues for freedom. The judgment of the court, of course, passes upon his status. Like judgments *in rem,* it might seem that such a judgment would, at least with respect to the *status,* be binding upon the whole world. *It is, however, not binding, except as between parties and privies, the reason being that this is a case where, in the determination of status, conflicting claims of property might be prejudiced.*

Davis v. Wood, 1 Wheat. 6, 4 L. Ed. 22, per Marshall, C. J.;
Thompson v. Pichell, 24 How. 233; 16 L. Ed. 648.

We concede, of course, that when it appears from the record that a cause of action exists against a named non-resident and that the non-resident has property within the state, constructive service may be had against him and judgment rendered to the extent of the property.

This proposition has no bearing upon the argument and has been elaborated by counsel merely because the judges who decided the cases quoted by them have used

the phrase *"in rem"*, or *"quasi in rem"*, or *"in rem sub modo"*, a mode of expression universally conceded to be inaccurate, but which, in the absence of a better phrase, is employed to connote that the judgment in this class of cases can have no effect except upon the property in question.

The real judgment *in rem* is binding upon the whole world, *but only as to matters not affecting conflicting claims of title;* the judgment *quasi in rem* is binding only upon the parties and their privies.

The real judgment *in rem* cannot go beyond the property in question. The judgment *quasi in rem* likewise cannot go beyond the property in question.

The infinite conclusive effect of a real judgment in rem is the very respect in which it differs toto coelo from a judgment quasi in rem.

See

Black on Judgments, sec. 793;
Hill v. Henry, 66 N. J. Eq. 150; 57 Atl. 554;
Cole v. Brandt, Fed. Cas. No. 2978;
The Heinrich Bjorn, 10 P. D. 44;
State v. Guilbert, 56 Ohio St. 575; 47 N. E. 551;
Bear Lake County v. Budge, 9 Idaho 703; 75 P. 614.

See also the opinion of

Loring and Lathrop, JJ., in *Tyler v. Judges, supra,*

who in this regard spoke for the court.

The English courts, with discrimination, have refrained from so loosely employing the phrase *"in rem"*

as to apply it to the present class of cases. They seem also to avoid using the hardly less loose expression "*quasi in rem*". After stating the rule applicable to cases where property is seized initiatory to the action as a means of bringing the defendant within the jurisdiction of the court—"*ad fundandum jurisdictionem*"—the suggestion that the action is "*in rem*" is repudiated in language of a meaning precisely the reverse of the argument advanced against us, the English Court of Appeal saying:

> "The two proceedings, therefore, though approaching one another in form, *are different in substance.*"
>
> *The Heinrich Bjorn,* 10 P. D. 44.

The Massachusetts court once, against a strong and ultimately victorious dissent, took the view that the difference between actions *in rem* and actions *in personam* is purely formal.

In

> *Atlantic Works v. The Glide et al.,* 157 Mass. 525; 33 N. E. 163,

a statute of Massachusetts attempted, by naming and serving the owners, to transform an admiralty action *in rem* into a common law action *in personam.* It was held that this could constitutionally be done.

Morton and Knowlton, JJ., dissented on the ground that

> "Whether the contract is maritime does not depend on the question whether it can be enforced by a lien and proceedings *in rem, but on the nature and subject matter of it.* * * * *If its nature*

and subject matter make it maritime, then actions to enforce it are exclusively cognizable in the district courts, except as to the common law remedies saved to suitors."

Justice Loring, it will be remembered, took the same view in the *Tyler* case. There he said:

"Whether a particular proceeding is or is not a proceeding *in rem depends upon the character of the right in the res sought to be enforced which is given by rules of substantive law.*"

On writ of error from this court the reasoning of the dissenting judges was justified without dissent.

The Glide, 167 U. S. 606; 42 L. Ed. 296.

There it is pertinently said, quoting approvingly Justice Grier, who spoke for the court in

The Yankee Blade, 19 How. 82, 89:

"The foreign and other attachments of property in the state courts, though by analogy loosely termed proceedings in rem, *are evidently not within that category.*" (See page 612.)

Further it is said (at page 617), quoting Justice Miller in the

Ad. Hine, 4 Wall. 571, 572:

"The statute provides that the vessel may be sued and made defendant, without any proceeding against the owners, *or even mentioning their names,* that a writ may be issued and the vessel seized, on filing a petition similar in substance to a libel; that after a notice in the nature of a monition, the vessel may be condemned and an order made for her sale, if the liability is established for which she was sued. Such is the general character of the steamboat law in the western states. While the pro-

> ceeding differs thus from a common law remedy, *it is also essentially different from what are in the west called suits by attachment, and in some of the older states, foreign attachments. In these cases there is a suit against a personal defendant by name, and because of inability to serve process on him on account of non-residence, or for some other reason mentioned in the various statutes allowing attachments to issue,* the suit is commenced by a writ directing the proper officer to attach sufficient property of the defendant to answer any judgment which may be rendered against *him.*"

In

Leigh v. Green, 193 U. S. 79; 48 L. Ed. 623,

this court having under consideration a tax case—a proceeding strictly *in rem*—and having also before it the dictum in

Tyler v. The Judges, supra,

took pains to confine proceedings *in rem* to their proper and accustomed subjects, and said, in full adoption of the majority view in the *Tyler* case:

> "*Of course,* merely giving a name to an action as concerning the thing rather than personal rights in it can not justify the procedure if in fact the property owner is deprived of his estate without due process of law."

An action strictly *in rem* does not, even viewed apart from history, work a deprivation of property contrary to the principles of natural justice, or without due process. The notice given in such cases is a substantial and reasonable notice, and the cause proceeds upon regular allegations.

On the contrary, the notice provided by the California act is neither justified by history nor by reason; and the complaint is barren of allegations directed against any defendant fictitious or real.

The opinion of the Supreme Court of California was not, we appreciate, rested on the ground that the proceeding is strictly *in rem.* It could not have been rested upon any such ground without running counter to every case where the question has been considered.

We are sure, however, that the California court would never have reasoned as it did—would never have considered the illusory notice provided by the act to be reasonable, if it had not been seriously and unwarrantably influenced by what seems to us a superficial view of the nature of proceedings *in rem,* particularly with regard to the notice therein required to be given.

It is quite natural to inquire—if a person not named and not served with process can be constitutionally devested of his property by a proceeding *in rem,* why can he not be constitutionally devested of his property by the proceeding under this act?

The answer, apart from history, is that the proceedings are not in any just sense analogous; that they are only formally and superficially similar, and that with reference to *res judicata* and to the giving of notice (the constitutional questions) they are substantially and fundamentally distinct.

In determining the question whether a given statute violates the dictates of natural justice, or, as in the

present case, more specifically, whether the notice provided by the statute is a substantial notice giving a real and not merely an illusory opportunity to defend the action, it is prudent to take into careful consideration the procedure sanctioned by usage.

Cunnius v. Reading, 198 U. S. 458.

The fact that questions of title have *never* been considered a proper subject for proceedings *in rem,* is to our minds highly persuasive evidence that such questions can not reasonably be considered analogous to the questions customarily determined in proceedings *in rem.*

Why have courts of admiralty failed to discover the analogy, now supposed to exist, of questions of title to property, to questions of responsibility in the use or ownership of property? Why have they invariably refused to try the question of title in a proceeding *in rem?* (In the same connection it may here be parenthetically asked, why have probate courts universally been denied jurisdiction of questions of title?) Is it because the supposed analogy—discovered by the California legislature in an emergency and, without deliberation enacted into law—was unaccountably overlooked by courts whose undeviating policy has been to conclude by their judgments all persons in the world who can, without violating the dictates of natural justice, be concluded? Or is it not rather because such courts have always been satisfied that no valid analogy exists, and that they cannot, without violence to fundamental principles, determine questions of title except as between parties before the court?

Cushing v. Laird, 107 U. S. 69.

It does not seem to us that a distinction so universally recognized should be held, or even felt, not to exist until after very careful examination of the grounds for the distinction.

We submit that the distinction does exist, and always has existed; that with reference to the point in this case, proceedings to enforce a liability incurred in the use or ownership of a *res,* bear no analogy to proceedings to determine title to a *res;* that the distinction is fundamental and based upon natural justice; that (the very point here involved) *while the seizure of the res does give substantial notice to the owners in a proceeding to enforce a liability incurred in the use of the res, the seizure of the res does not give notice in a case like the present where questions of title are to be determined.*

In an action strictly *in rem* the seizure of the *res* is necessarily notice to the master of the ship, or other agent of the owners in charge of the property. He is the representative of all interests, not only in law but in fact. Notice to him is as substantially notice to all owners, as notice to a designated agent, or an agent in charge of a business, or an agent upon whom it has been agreed that process may be served, is notice to the principal. In all such cases, the notice is real; and gives a real opportunity to defend. All interests are represented by the agent who is, also, responsible to his principals for the proper protection of their rights. Further, all interests are a unit in opposing the claim of the libelant.

In the proceeding under the California act, on the contrary, the posting of the notice upon the property (in

supposed analogy to the nailing of the writ upon the masthead in the admiralty) does not give notice to adverse claimants or to their representative. The interest of the petitioner (who is himself in possession of the property) is, of course, adverse to any interest that may exist. He is in no sense a representative of the adverse claimants, whose interests are not only opposed to his, but are also, with respect to the purpose of the proceeding, mutually antagonistic.

The petitioner will not, of course, defend for claimants adverse to himself; nor will any claimant, who happens to come into the proceeding, defend for other claimants, as would be the case in an action strictly *in rem,* where the interests of all, the person in possession included, are necessarily protected by each in opposing the libelant whose claim, if it falls as to one, falls as to all.

In this very case the petitioner in the proceeding was the tenant of the persons whose fee he sought to acquire for himself.

The distinction goes to the very essence of due process —viz.: the giving of a substantial notice. For, if the supposed notice given by posting the summons upon the property does not, under the circumstances of the California proceeding, give at least the notice given by the seizure of the property in an action *in rem,* then small indeed is the support that the statute can find in reason, as it will be able to find none in authority.

The arrest of the property in an action *in rem* gives substantial notice *to all persons in interest by giving notice to the person in possession who is the representa-*

tive of all interests—the agent designated and appointed by all interests to take charge of and protect all interests.

It is, of course, a corollary of the principle of representation that the liability that has been incurred by representatives in the management or control of the property should be enforceable by proceedings of which *notice is given to the owners through their representatives: in other words, their agents in charge of the adventure.* Notice is not given merely to the ship or other inanimate property in an action *in rem.* Such a fiction would be an absurd evasion of the universal requirement of substantial notice to the persons to be affected by the judgment. The arrest of the property in an action *in rem* has, since the very earliest times, been considered not as mere idle form for the purpose of informing it, an inanimate thing, of the pendency of an action whereby it may be separated from its owner; but, on the contrary, the arrest has been considered as *a substantial notice to the owners, as it in fact is, by reason of the notice it gives to the agents in charge who, of course, represent the interests of all concerned.*

In that ancient work, *The Black Book of the Admiralty* (edited by Sir Travers Twiss), it is shown (Appendix, p. 350) that the purpose and effect of the arrest is to cite the owner *through the ship: "per eandem navem".* It follows that if notice of the proceeding is given by service of a citation in such a manner that it comes to the notice of the master or other agent *(the representative of all persons concerned),* this is sufficient without an actual arrest of the ship.

The Nautik, 7 Asp. Mar. Cas. 591.

It also follows that unless notice of the action in rem be, at the least, so given as normally to come to the notice of an agent representative of all persons to be affected by the decree, the sentence of the court will be ex parte and not to be regarded. And it was so held by the great Chief Justice in a case the reasoning of which can not be denied applicability to the point we are now considering.

He said:

> "Those on board a vessel are supposed to represent all who are interested in it, **and if placed in a situation which requires them to take notice of any proceedings against a vessel and cargo, and enables them to assert the rights of the interested, the cause is considered as being properly heard, and all concerned are parties to it.** But the owners of vessels navigating the high seas, or lying in port, cannot take notice of any proceedings which may be instituted against those vessels in foreign countries; and, consequently, such proceedings would be entirely *ex parte,* and a sentence founded on them never would be, and never ought to be regarded."
>
> *Rose v. Himely,* 4 Cranch. 241, 277-278.

The Chief Justice considered that the validity of a judgment *in rem* depended on whether the notice was of such character as to "enable them" (the agents in charge of the property and "who represent all who are interested in it") "to assert the rights of the interested". Otherwise the "proceedings would be entirely " *ex parte,* and a sentence founded on them never would " be, and never ought to be regarded".

What would have been thought of a "judgment" rendered in a proceeding brought by a tenant for years, as

in the present case, whereby, without any charge alleged against him, without being named, and without any notice, the landlord is deprived of his fee by the very person who alone is in possession of the property and has it under his care and control?

In the opinion of the English Court of Appeal the circumstance that alone saves a judgment *in rem* from being "manifestly contrary to natural justice" is the fact that there is in all such proceedings, for the reasons above stated, a substantial notice to the persons to be affected, who have, therefore, a real and not merely an illusory opportunity of protecting their interests.

> *The Parlement Belge*, 4 Asp. Mar. Cas. (N. S.) 234, 245.

All the cases, we believe, so justify proceedings *in rem*. (See *Pennoyer v. Neff*, 95 U. S. 714; 24 L. Ed. 565, 570.) The judgment in such proceedings does not violate the principles of natural justice, because and only because, as said by Chief Justice Marshall, notice is given to the owners through their representatives in charge of the property, and **if the circumstances of the case are such that the representatives normally "cannot take notice", or if, we say, the person in possession of the property is not representative of the claimants—and such is the case under the California act in all cases, for the person in possession is himself claiming adversely to any claimants who may possibly exist—then it is clear that the proceeding lacks the very quality that saves a proceeding in rem from being "manifestly contrary to natural justice".**

In this very case, can it be said that our tenant was representing us when he took his *ex parte* oath that he was the owner in fee simple absolute?

It is plain law that an agent upon whom service may be had in an action against the principal cannot, when he himself is plaintiff, serve himself as agent. It cannot be doubted that such notice as is given under the California act by the posting of summons on the property can be notice only to the person in possession who, *so far from being representative of the adverse claimants, is himself the petitioner with an interest incompatible with the idea that notice will thereby be given to his opponents.* Are we to be required, every week until the year 1950, to go upon the land which our tenant is holding for us, in order to see whether he is violating his trust by instituting a proceeding under this act? Indeed, we are not even entitled to go upon the land.

It is upon this precise ground that a master cannot bring an action *in rem* against the ship; for to permit him to do so is to permit a plaintiff to serve himself, and thereby give jurisdiction over his adversary.

As held in

The Larch, 2 Curt. 427; Fed. Case No. 8085,

by Justice Curtis, to permit a master to bring an action *in rem,*

> "would put into his hands the means of acting directly against the title and interest of his owner in distant ports, **where the owner had no representative but himself,** even to the extent of procuring a judicial sale of the vessel to satisfy those advances."

And in

The Grand Turk, 1 Paine 73, Fed. Case No. 5683, Justice Livingston held: the right of proceeding *in rem* is denied the master, for the reason that it would permit him to become

> "purchaser of the vessel, under a sentence founded on proceedings originating with himself, and where a condemnation might be had before the owner could possibly be apprized of the suit".

See also:

Reid v. Darby, supra, (10 East 143);
The Tilton, supra, (5 Mason 465, 474).

Now, under the present act the petitioner, who is in possession, is either the representative of a possible claimant, or he is not. If he is such representative he is guilty of a violation of his trust. If he is not such representative, then the real owner gets no possible notice of the bringing of the action.

In the proceeding, the decree in which is said to bind us, the petitioner was and is still our tenant, whose duty it was and is to hold possession of our land until the year 1950 in subordination to our fee. We were entitled to assume that he would not be guilty of so monstrous a breach of trust as he is convicted of by the present case. If, through no fault or neglect of ours (and the present case shows that there was none) he is permitted by the act of the legislature of California to "acquire" our title for his own private use and without compensation, then will be permitted that which, we believe, has *never* before been permitted in any civilized country.

If a tenant can thus "acquire" the fee, a mortgagor can get rid of his mortgage, and a trustee of his trust in the same manner. In fact the act expressly authorizes all these things to be done and it is not a departure from the record to say that they are being done. Will counsel argue that such is due process of law, or that the fundamental principles of justice have been in this case considered or pursued?

To the suggestion that an action to quiet title can be made an action *in rem* for the purpose of binding unnamed persons with respect to whom nothing is alleged, it seems to us a sufficient answer that every case in which the question has been considered holds that, at the very least, known or ascertainable claimants must be named and personally notified. If a proceeding *in rem* be sufficient, it would not, of course, be necessary to name or serve even known claimants residing in the neighborhood. And in the Tyler case Justice Holmes shows that if this be an action *in rem* it is unnecessary even to publish a monition: that publication in such cases is a safeguard provided merely by rules of court. The suggestion in *Arndt v. Griggs* (134 U. S. p. 321), that the necessity for constructive service upon non-residents did not justify a mode of pretended notice "against natural justice" is untenable under this recently suggested doctrine, and the decision to the same effect in *Roller v. Holly,* 176 U. S. 398, must be deemed a judicial inadvertence; for the action there was as completely *in rem* as any action to quiet title can be unless it be adjudged that if the legislature goes half way and gives

some, though an inadequate, notice the proceeding is lacking in due process, but if the legislature goes the whole distance and gives *no* notice the procedure is constitutional.

In *Webster v. Reed,* 11 How. 460, the statute was passed to settle and ascertain the title to certain lands and to partition and sell them. The land was within the territorial jurisdiction and sovereignty. The commissioners were authorized to sue the claimants for their services without naming them as defendants or serving them except by publication, and the judgments *were made a lien on the lands.* The court said the suit was not a proceeding *in rem* against the land, but was *in personam* against the owners of it. In this they but followed the, of course, masterly and lucid exposition of Marshall in the case of *Mankin v. Chandler,* cited by Justice Holmes, in the Tyler case, and anticipated and justified the judgment in *Freeman v. Alderson.* In so far as the statute created and authorized the enforcement of a lien on the property—in so far as it thus dealt with the *res*—it satisfies every definition of a proceeding *quasi in rem.* As said by Justice Field (119 U. S. p. 190), though dealing entirely with the realty, it was not an action *in rem.* It was a proceeding against parties who must be named, and though the settlement of title was sought, that did not change its character as a personal action. *Webster v. Reed* is also conclusive that it matters not that the legislature enacted that the proceeding should bind all claimants named or unnamed, for no form of enactment could more clearly evince such a purpose than did the Iowa statute.

In

Hollingsworth v. Barbour, 4 Peters 466; 7 L. Ed. 922,

this court had occasion unanimously to hold void a judgment rendered under the Kentucky statute against "unknown heirs".

It is to be noted that this was before the 14th amendment; consequently no question as to the restraints put upon the legislature by the federal constitution could be considered. It is true that the court found that the particular proceeding was not authorized by the statute: nevertheless the whole tone and reasoning of the decision is such that it could well be adopted today in enforcement of the 14th amendment. After stating certain arguments of counsel the court said (p. 472):

> "This argument renders it necessary to examine the several acts of Assembly authorizing proceedings against absent defendants: for, *by the general law of the land,* no court is authorized to render a judgment or decree against anyone or his estate, until after due notice by service of process to appear and defend. *This principle is dictated by natural justice,* and is only to be departed from in cases expressly warranted by law, and excepted out of the general rule."

Clearly, every lawyer knows now that, since the 14th amendment, the legislature cannot create a valid procedure against "natural justice", nor except a case "out of the general rule" required by "natural justice".

Roller v. Holly, supra.

Again the court says (p. 475):

> "It is an acknowledged general principle that judgments and decrees *are binding only upon parties*

and privies. The reason of the rule is founded in *the immutable principle of natural justice,* that no man's right should be prejudiced by the judgment or decree of a court without opportunity of defending the right. This opportunity is afforded (or supposed in law to be afforded) by a citation or notice to appear, actually served: or constructively, by pursuing such means as the law may, in special cases, regard as equivalent to personal service. The course of proceeding in admiralty causes, and some other cases *where the proceeding is strictly in rem,* may be supposed to be exceptions to this rule. They are not properly exceptions; the law regards the seizure of the thing as constructive notice to the whole world, and all persons concerned in interest are considered as affected by this constructive notice." (For limited and special purposes, but *not* for the determination of adversary claims to property; see *Cushing v. Laird,* 107 U. S. 69.) "But, if these cases *do* form an exception, *the exception is confined to cases of the class already noticed, where the proceeding is strictly and properly in rem,* and in which the thing *condemned* is first seized and taken into the custody of the court. *The case under consideration is not properly a proceeding in rem;* and a decree in chancery for the conveyance of land has never yet within my knowledge, been held to come within the principle of proceedings *in rem,* so far as to dispense with the service of process *on the party.* There is no seizure nor taking into the custody of the court the land, so as to operate as constructive notice. Constructive notice, therefore, can only exist in the cases coming fairly within the provisions of the statutes authorizing the courts to make orders of publication, and providing that the publication, when made, shall authorize the courts to decree. It has already shown that this case is not within the provisions of any statute."

For a recent Minnesota case holding that the distinction between proceedings *in rem* and proceedings *in*

personam is substantial and not to be destroyed by legislature without "evasion of the constitutional rights of the parties", see *McNamara v. Casserly,* 63 N. W. 880.

See also

Kundinger v. Saginaw, 59 Mich. 335;
State v. Common Council, 42 Wis. 287;
Smith v. Cochrane, 9 Wash. 85; 37 Pac. 311.

The single and only exception to the rule that due process of law involves *named* parties to a *controversy* and that the judgment binds only parties to whom citation is issued or who voluntarily appear, is to be found in proceedings strictly *in rem;* and a statute that should undertake to dispense with individual and cited parties, at the same time making the judgment binding on all the world, in an action of ejectment, replevin or to quiet title or the like, must be held not to give due process of law. Such a statute would, if any could, be held an attempt to justify the procedure by merely giving a name to the action as concerning the thing rather than personal rights in it. The right to be named and to be cited and the maxim that a judgment not *in rem* binds only the parties, concern the substance and very essence, rather than the form. The legislature has no more power to declare a judgment in an action of trover or replevin or ejectment binding on all the world, than it has to declare binding the judgment in an action of assumpsit against a defendant not named, cited or served. The same reasoning upon which it is contended that, in these respects, a judgment under the California act is to be treated as a judgment *in rem,* would justify

any procedure or judgment affecting persons or property within the territorial jurisdiction. That argument is, in effect,

> "the state has control over property within its limits; and the condition of ownership of real estate therein whether the owner be stranger or citizen, is subject to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. * * * The well being of every community requires that the title of real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in its nature * * * the manner of discharging it must be determined by the state. * * * All things within the territorial boundaries of a sovereignty are within its jurisdiction * * * and the mode of obtaining this jurisdiction may be prescribed wholly, entirely and exclusively by the statute."

Obviously all this and every word of it applies equally to all personal property of every kind, tangible and intangible, and to all *persons* within the sovereignty; and if one of the substantial safeguards thrown by the guaranty of due process around the exercise of jurisdiction in proceedings not *in rem*, can be thus dispensed with, so all of them can be denied. A resident of California might be deprived of his title to bonds and stocks by a judgment rendered in an action to which he was not a party in any other way than by the effect of a published monition to all whom it may concern, issued upon the plaintiff's *ex parte* affidavit that he claimed the bonds and did not know of any adverse claimant. One assaulted at midnight might be allowed to guess that

certain property might belong to his unknown assailant and to attach the property and procure a judgment authorizing its sale declared good against all the world, upon a monition to all persons whom it may concern.

On this theory there is no longer any necessity for naming and citation and personal service on known residents, even in the most strictly personal actions. Any alleged creditor may be allowed to sue any alleged debtor and by mere publication obtain a judgment, and if he says he fears that the debtor may have assigned his property and that he does not know and has not been informed who the assignee is, he may be authorized to file an affidavit to that effect, describing all the property, real and personal, of his alleged debtor and obtain a monition to all the world to come in and show their claim or be forever barred. Indeed, he need not be required to make any affidavit; and it is conceded that the constitutional requirement does not even include a monition. The theory is that it is at least a proceeding *quasi in rem*, and the *res* is within the territorial jurisdiction and absolutely subservient to its sovereignty. Due process of law cannot stand in the way, because by that application of this doctrine of absolute control, nothing is left of due process of law except the requirement of the seizure of the property if it be movable, or its "constructive" seizure if it be fixed.

Do the authorities cited warrant this court in declaring a principle so dangerous, or making a precedent fraught with such consequences?

REVIEW OF CERTAIN CASES CITED IN SUPPORT OF THE ACT.

In an effort to show that the present act provides reasonable notice, counsel set forth, in the Court of Appeals, a list of authorities, practically exhaustive. These authorities, however, were not classified; they are far more pretentious to the eye than weighty to the judgment.

The cases cited naturally group themselves as follows:

1. *Actions against "unknown heirs" to enforce the obligations of their ancestor surviving against assets in their hands.*

Most of the cases cited are of this character, although few, even of these, hold anything in point; while in others no constitutional question was presented or considered.

McMahon v. Smith, 65 Ark. 591; 65 S. W. 459: discusses statute providing for service upon heirs whose *names* are unknown.

Hall v. Melvin, 62 Ark. 439; 35 S. W. 1109: holds that before there can be jurisdiction as against "unknown heirs" it must appear that there *are* heirs and that their *names* are unknown; for

> "if there be no heirs, no service could be had, for there would be no one to serve, and the court would be without jurisdiction. Besides, if there were no heirs, there would be no cloud upon the title to remove, and no suit could be brought or would be necessary for that purpose".

Simmons v. Heirs of Fry, 19 D. C. 472: specific performance against heirs whose *names* were unknown.

Johnson v. Thomas, 23 App. D. C. 141; *Gwinn v. Brown,* 21 App. D. C. 295: proceedings to establish title as against heirs.

Heirs of Whitney v. Kimball, 4 Ind. 546: held that it must appear that the names of the heirs are unknown.

Guise v. Early, 33 Ia. 683; 33 N. W. 683: held that a certain decree was void as against heirs claimed to be unknown, the statute not having been complied with.

Pile v. McBratney, 15 Ill. 314: ejectment against heirs whose names were not known.

Thornton v. Houtze, 91 Ill. 199: partition suit; names of heirs not known.

Burton v. Perry, 146 Ill. 71; 34 N. E. 60: proceeding against certain heirs and devisees whose names were not known. The statute gave three years to come in after decree. Generally such statutes show great leniency in the case of heirs not actually served. The court said, *inter alia:*

> "In authorizing the heirs of a deceased person, who has been interested in the subject-matter, to be made parties under the name of 'unknown heirs', when their names are unknown, the statute presupposes that the death of such persons is an established fact. It was never designed to cut off the known rights of such a person while in life, even as against innocent purchasers for value. *It has reference to deceased persons, and not to live persons.*"

Shirley v. Mitchell, 3 J. J. Marshall (Ky.) 684: unknown heirs; the court held:

> "The decree is against the unknown heirs in their own right. It should have been rendered, *to be*

levied of the estate descended to them, if it had been right to render any decree against them."

Hynes v. Oldham, 3 T. B. Monroe 266: unknown heirs; decree held valid *without any affidavit that names of heirs were unknown,* although "such an affidavit is ex- "pressly required by an act of assembly"!

Taylor v. Bate, 4 T. B. Mon. 267: heirs were alleged to be unknown, although plaintiff's proofs showed who they were. Held that there was no jurisdiction.

Blights Heirs v. Banks, 6 T. B. Mon. 192: affidavit held insufficient.

Tevis v. Richardson's Heirs, 7 T. B. Monroe 654-657: unknown heirs; affidavit held insufficient. The court said:

> "It might be a question of some moment whether a court of equity, when a good and sufficient title is stipulated to be given, ought to compel a vendor to accept a title derived through a proceeding in chancery against unknown heirs. It is an *ex parte* proceeding, and liable to be assailed in many ways, and must therefore be strictly pursued, as it goes against a defendant by not a very definite description of character, without even naming him, *when his name is given to identify him.* If there be a will, and the title has gone to a devisee as such, *or is held by purchase and not by descent, the proceeding against the unknown heirs, it is evident, can not be effectual."*

Benningfield v. Reed, 8 B. Mon. 102: unknown heirs.

Thurston v. Masterson, 9 Dana 228: unknown heirs; affidavit held insufficient.

Jeffreys Heirs v. Hands Heirs, 7 Dana (Ky.) 89: unknown heirs; decree held void because, *inter alia,*

"the complainants should be presumed to have known that they" (the "unknown" heirs) "lived in a county in this state, near to that in which the bill was filed".

Coombs v. Persons Unknown, 82 Me. 326; 19 Atl. 826: unknown heirs; proceeding for partition. Eight of the heirs appeared; two minor heirs, whose names seem to have been unknown, did not appear. The court said:

> "The interest of the minors will not, however, be without protection. *No one is claiming their share. It will remain to them."*

Guyer v. Raymond, 29 N. Y. S. 395: unknown heirs in partition suit.

People v. Ryder, 19 N. Y. S. 977, holds C. C. P., section 1582, relating to distribution of proceeds of sale in partition suit, unconstitutional *as not providing sufficient notice in case of known heirs.* Said the court:

> "It is entirely possible that such known heirs may not have been parties to the original suit, *and certainly the judgment in partition did not, and could not, determine the rights, even of the parties to it in the share deposited."*

And again:

> "It may be that as to sales subsequent to the statute, or even where the death of one of the original heirs was subsequent to that time, *the legislature could make a rule for the succession, upon death, of property of this character, sui generis, and applicable to such property alone."*

(See also *People v. Ryder,* 124 N. Y. 500; 26 N. E. 1040.)

Sullivant v. Weaver, 10 Ohio 275: proceeding against heirs whose names were unknown.

Byrnes v. Sampson, 74 Tex. 79; 11 S. W. 1073: partition suit against persons named and unknown heirs. Held evidence too doubtful to justify decree against the unknown heirs.

Talliaferro v. Butler, 77 Tex. 578; 14 S. W. 191: partition against unknown heirs.

Sloan v. Thompson, 4 Tex. Cv. A. 419; 23 S. W. 613: unknown heirs.

Bassett v. Sherrod, 13 Tex. Cv. A. 327; 35 S. W. 312: partition against unknown heirs.

Hardy v. Beatty, 84 Tex. 562; 19 S. W. 778: specific performance of decedent's contract against heirs, whose names were unknown.

Kilmer v. Brown, 28 Tex. Cv. A. 420; 67 S. W. 1090: partition against unknown heirs. The court held:

> "If the petition showed, as in this case, *a cause of action against the ancestor, who is alleged to be dead,* his unknown heirs might have been cited as parties defendant under the act of 1848."

Truesdell v. Rhodes, 26 Wis. 215: unknown heirs.

Well might all such cases have been passed *sub silentio* by Vice-Chancellor Stevens and Justices Field and Loring, as well as by the great constitutional cases really in point here. Many of this array of cases were decided at a time when, and in states where, it was thought that the legislature had authority to prescribe such form of process as it deemed fit without restraint of constitu-

tional limitations. This is illustrated by *Pennoyer v. Neff;* see particularly Justice Hunt's dissenting opinion therein, calling attention to the fact that many statutes were rendered invalid by the decision of the court. The case of *In re Empire City Bank,* 18 N. Y. 199, much relied on by counsel in the Court of Appeals, is expressly the basis of Justice Hunt's dissenting opinion. The Iowa, Wisconsin, Kentucky, Arkansas and Texas decisions cited can hardly have weight in this court. All of these states held a doctrine subsequently exploded by this court. Even in actions admittedly *in personam* it was there thought that publication was sufficient without attachment of property!

McMullen v. Guest, 6 Tex. 275;
Lyon v. Comstock, 9 Ia. 306;
Jarvis v. Barrett, 14 Wis. 642;
Burnham v. Comm., (Ky.) 1 Duval 210;
Borden v. State, 11 Ark. 519.

Texas, particularly, seems to be in continual difficulty with respect to service of process.

Roller v. Holly, 176 U. S. 398;
Howard v. DeCordova, 177 U. S. 609.

But even if such cases were of authority to govern the decision of the grave constitutional question here presented, and even if they were analogous to the case at bar, the present act would be condemned.

It has been noted that the above were cases brought against heirs having assets of their ancestor in their hands, and the heirs were proceeded against as a class to enforce the obligations of the ancestor as respects the

assets. The suggestion of counsel in the court below that in such cases there is, equally with proceedings under the McEnerney Act, no cause of action and no defendant, hardly needs reply. In *all* such cases there has been a definitely stated cause of action against defendants designated specifically in a fashion as well calculated to give notice as if the particular names had been stated of the individuals comprising the class. Their names alone were unknown, and they were designated as the "unknown heirs of Robert Jones".

It was necessary to show that there were heirs.

Hall v. Melvin, 62 Ark. 439; 35 S. W. 1109, *supra.*

The judgment was only against the "estate descended to them".

Shirley v. Mitchell, 3 JJ. Marshall 684, *supra.*

If the estate was in fact held by them by purchase and not by descent the judgment was void.

Tevis v. Richardson's Heirs, 7 B. Mon. 654, 657, *supra.*

The judgment was void if, in fact, the heirs "lived in " a county in this state, near to that in which the bill " was filed", because in such case it would be presumed that they were known or ascertainable.

Jeffreys Heirs v. Hands Heirs, 7 Dana 89, *supra.*

Under the McEnerney Act, on the contrary, the next door neighbor is concluded as to title and boundaries; mortgages and liens created by the plaintiff himself or his immediate grantor are erased; trust estates are ter-

minated; and tenants get the fee. The persons to be concluded, if any, are not a class, having interests in common, but their position is mutually antagonistic; one is not protected by the defense of any other. All kinds of adversary, and non-adversary interests are concluded. The plaintiff need not name any person as defendant *unless he can remember his claim;* no inquiry is necessary.

In actions brought against heirs and devisees as a class, the designation of the parties as "unknown heirs and devisees of Robert Jones" may be due process of law: such designation is definite and gives equal notice with the naming of each person in the class; further, such a proceeding is part and parcel of the state's prerogative jurisdiction to administer the estates of deceased persons.

When a man dies his heirs and devisees take the property of their ancestor under the statute and subject to the obligations that he has incurred with relation to it: the cause of action survives against the assets in their hands. The heirs and devisees constitute a *class,* are liable *as a class* (*quoad* the property) and each person in the class has a right to contribution as against every other person of the class. In suing them, under certain statutes, the *class* designation may, under some circumstances, be given, e. g., "the unknown heirs of Robert Jones". The designation is natural. It is as much a name as Johnson, or Robertson. Every one of the class recognizes the description of the class, and knows that he is included in it. Their acquaintances and agents, seeing

the published summons, will inform them of the pendency of the action. There is not the slightest difficulty in identifying them from the record. A cause of action is stated, and is the same as to them all *as a class, irrespective of the individuals comprising the class.* The defense of any one is the same as the defense of any other; it is their ancestor's defense. The action is, in fact, against the estate of their ancestor; they must respond to the extent of the property inherited by them, *and such proceedings may well be, and often are made part and parcel of the administration of estates.* So far as concerns the class of heirs and devisees to be concluded the proceeding has all the characteristics of an action strictly *in rem.* Persons claiming the property, not as heirs or devisees, but adversely to the estate are, of course, not bound. It is not, therefore, an action strictly *in rem,* in the sense of binding the *whole* world—it only concludes such portion of the world as bear to the estate the relation of heirs and devisees.

It is well known that the obligations of the ancestor are, in many states, liens upon and enforced against the estate as a condition precedent to its vesting in the heirs; and that in the enforcement of these obligations the heirs need not be made parties or notified at all.

Cf. also

Brenham v. Story, 39 Cal. 179;
Estate of Porter, 129 Cal. 88.

As Justice Loring clearly points out, no rights of property guaranteed by the constitution have vested in the heir which such proceedings devest.

It is upon this principle that this court proceeded in its carefully limited decision in

Hamilton v. Brown, 161 U. S. 256.

2. *Proceedings under the Illinois Burnt Records Act.*

Bertrand v. Taylor, 87 Ill. 235: does not show that there was any unknown party. Without discussion court held act within power of legislature *as a statute of limitations.* It does not appear from the report what constitutional question was raised or discussed.

If the defendant was a named party, no question of due process could have been involved. In fact the only constitutional question considered was with reference to the provision of the act dispensing with trial by jury (see *Heacock v. Lubeke,* 107 Ill. 396, 400).

Mulvey v. Gibbons, 87 Ill. 367; decree reversed because, *inter alia,* a decree of foreclosure of a mortgage against the mortgagor will not affect one holding the equity of redemption by conveyance *who is not made a party to the suit;* and because further, a party to a former suit, and a well known resident of the county cannot be treated as an "unknown" person under the statute.

Heacock v. Lubeke, 107 Ill. 396: appeal by a named and served party, who appeared and proceeded to trial on the merits. The only constitutional question consid-

ered, or that could be considered, was that raised by plaintiff in error, viz.: "the act is unconstitutional as "depriving parties of the right to trial by jury" (see p. 398). Without discussion the court held that the point had been determined against this contention in *Bertrand v. Taylor, supra.*

Gage v. Caraher, 125 Ill. 447; 17 N. E. 777; named and served parties defendant appealed from decree. No question of due process was or could have been presented. The only constitutional question raised or discussed was the power of the legislature to make a tax deed *prima facie* evidence of the validity of the proceeding prior to the deed. It was further argued that the petition was insufficient for failure to allege the invalidity of the tax deed. The court held that, under the Burnt Records Act,

> "This position is untenable. All that is required in respect of adverse claimants or their titles is that *such claimant shall be named in the petition and made defendant.*"

Smith v. Gage, 12 Fed. 32, was brought originally in the Illinois court under the Burnt Records Act. Gage, a named party and non-citizen removed the case to the federal court. No question of due process was, or could have been presented. Judge Blodgett took jurisdiction, and said that the act seemed to provide

> "a sort of dragnet into which all *conflicting* claimants of title or interest in the land might be drawn, and where the court, *with all the parties before it,* should determine *their respective rights*".

Counsel stated in the brief in the Court of Appeals that: "The constitutionality of this" (the Illinois Burnt Records) "act was affirmed by the Supreme Court of the "United States in *Gormley v. Clark,* 134 U. S. 338, 10 "Sup. Ct. Rep. 554." This bald statement was made in the course of a discussion dealing solely with the question of due process in the case of persons not made parties but to be concluded by the judgment. The fact is that this court had no such question before it, and entered into no such discussion. It was a case removed into the Circuit Court on the ground of diversity of citizenship, and the only parties to be affected by the decree were personally in court. It was held that the title as to parties before the court could be investigated and determined by a court of equity, and that a trial by jury, in such cases, was not required by the federal constitution. The court said that under the act as construed by the Supreme Court of Illinois

> "all that is required in respect to adverse claimants or their titles is, that *such claimant shall be named in the petition and made defendant;* that nothing more is required to give the court jurisdiction under the statute to investigate the claims of title to the premises, and by its decree establish and confirm the title in the person in whom it is found to be vested, and to make all such orders, judgments and decrees as shall be necessary to that end; that decrees so entered are, as to the title so found forever binding and conclusive *between the parties;* that the statute was in effect a statute of limitations, and under the circumstances was not unreasonable, but demanded as a matter of safety in a great emergency; that it was not open to the objection of unconstitutionality, because not providing for trial by

jury or otherwise; and that the question whether a jury should be allowed could not arise unless a jury was demanded" (p. 346).

The fact that cases under the Illinois act were removable to the federal court, shows conclusively that the proceeding was not considered as one *in rem*, "against the whole world". For how otherwise could it be possible for the Circuit Court to proceed to a decree binding *only* the rights of the petitioner and the non-citizen who removed the case? As to all claimants who were not non-citizens the case would remain and be proceeded with in the state court. Certainly the state court could not find the petitioner to be the owner and establish his title "against the world", while, at the same time, the Circuit Court decrees against the petitioner and in favor of the non-resident defendant. If the decree under the act could have any force whatever against persons not made parties an entire and inseparable case would be presented—clearly not removable to the federal court.

Graves v. Corbin, 132 U. S. 571;
Torrence v. Shedd, 144 U. S. 527.

On the other hand if such a proceeding were removable at all the whole case would go into the Circuit Court. This of course was not the fact in either *Smith v. Gage*, or *Gormley v. Clark, supra.* Nor would the Circuit Court attempt to make a decree "operative as to the whole world".

O'Callaghan v. O' Brien, 199 U. S. 89.

It has been seen that the cases lay emphasis upon the proposition that under the Burnt Records Act, the court

was authorized to pass upon and determine *conflicting claims as between the parties.* It was, as Judge Blodgett well said,

> "a sort of dragnet into which all conflicting claimants of title or interest in the land *might* be drawn. and where the court, *with all the parties before it,* should determine *their respective rights.*"

As said by this court:

> "decrees so entered are, as to the titles so found forever binding and conclusive *between the parties*" (134 U. S. 338, 346).

That the decree under the act had no effect except as to parties, and did not operate of its own force to affect the rights of strangers or to conclude "the whole world", is manifest also from decisions of the Supreme Court of Illinois.

In *Harms v. Jacobs,* 155 Ill. 221; 40 N. E. 488; the petition was dismissed as to a certain defendant. Afterwards a final decree was rendered in favor of the petitioner. The defendant, fearing, no doubt, that the decree might be construed as affecting his rights, i. e., that it might be considered as establishing the petitioner's title "against the whole world", sued out a writ of error.

The Supreme Court of Illinois held:

> "When the decree was entered he was no more a party to the action *than if he had never been named as a defendant.* The decree was not against him and had no more binding effect on him *than it has upon any other third party.*"

The writ of error was therefore dismissed.

The proceeding seems to have been devised to give possible claimants an opportunity to come in and litigate: but did not, in the absence of real litigation, conclude persons not made parties. In this respect, as to adversary titles, the decree would have the same effect as in proceedings under the acts to confirm Mexican grants—only those who appeared and litigated are bound.

United States v. Conway, 175 U. S. 60, 70-71.

The case of *Goodkind v. Bartlett*, 153 Ill. 419; 38 N. E. 1045, also illustrates the scope of the Illinois act.

Service was had by publication upon "John N. Hum-
"mer and.....Hummer, his wife, and all whom
"it may concern", by publication, the Hummers being non-residents and not personally served because not found.

Said the court:

> "But it is insisted by appellee that the said proceedings and decree, being against John N. Hummer and.....Hummer, his wife, and 'all whom it may concern', were not conclusive upon Rachael B. Hummer, the wife of John N. Hummer; that she could not be barred of her inchoate right of dower in that proceeding unless she was a party by name. In the absence of any statute permitting it, persons natural or artificial cannot be made parties litigant by mere descriptio personae, but must be designated by name, both in the process and in the judgment. Schmidt v. Thomas, 33 Ill. App. 109; Sossman v. Price, 57 Ala. 204; 17 Am. & Eng. Enc. Law, p. 493, note 2. And a proceeding by or against a party by a mere fictitious name will be a nullity.

Marsh v. Astoria Lodge, 27 Ill. 421; 17 Am. & Eng. Enc. Law, p. 488, note 1. But in case of misnomer, if the summons is served on the party intended, and he fails to appear, or, appearing, fails to object, the judgment against him will be binding. M. E. Church v. Garnsey, 66 Ill. 132; Pennsylvania Co. v. Sloan, 125 Ill. 72, 17 N. E. 37; Pond v. Ennis, 69 Ill. 341; 17 Am. & Eng. Enc. Law, p. 491, note 1. The rule being as above stated it is plain that the joinder as codefendants of John N. Hummer and '..... Hummer, his wife,' did not make Rachael B. Hummer, his wife, a party to that proceeding so as to make the decree effectual as against her. It is not shown or pretended in the bill that the true name of Rachael B. Hummer was not, at the time of said proceedings and entry of the decree therein, known *or ascertainable.* And for aught that appears the Christian name of Mrs. Hummer and her post-office address may have been learned upon slight inquiry. **It requires, indeed, but the mention of it to show that to allow legal proceedings against parties by mere descriptions or fictitious names would be simply absurd and grossly illogical."**

We cannot find that any proceeding under this act was ever sustained without adverse parties: in fact under the decisions cited this could not be done. With respect to persons not parties the proceeding seems to have been merely invitational; and as to such persons not made parties the decree itself was ineffectual. Of course, possession under the decree and the lapse of time limited by statute would, in like manner with any other statute of limitations, bar all rights. There is, however, nothing of this sort in the present case.

It is highly significant that in the Simon case, which is really in point here, the court, for obvious

reasons, did not cite or rely upon adjudications under the Burnt Records Act, nor can we find that any of those cases has ever been cited as authority anywhere upon any question of due process of law.

3. *Partition proceedings.*

Mason v. Messenger, 17 Ia. 261, involved the validity of a decree rendered under an act of the Iowa territorial legislature approved January 4, 1839, partitioning land embraced in the "Half-Breed" tract. It does not appear that the persons attacking the decree were sued as "*unknown*" parties.

That the parties there complaining were *named,* seems clear from the decision of the same court in *Reed v. Wright* (Ia.), 2 Greene 15, where a similar judgment under a similar statute was held void; the court saying (p. 38):

> "In the case before us, the want of jurisdiction over the parties appears upon the face of the proceedings. Suit is brought and judgments entered against '*owners*' of certain lands. **Parties cannot be brought into court in this manner, and judgments can not be so rendered. These judgments are void; as the court acquired no jurisdiction.**"

In *Reynolds v. May,* (Ia.) 4 Greene 283, an action had been brought against "the heirs of Otis Reynolds". It was not made to appear whether or not there were heirs. In other words, there was no *reus*—no party defendant.

Said the court:

> "Section 1694 of the code provides, that 'when the precise name of any defendant cannot be ascertained, he may be described as accurately as

practicable, and when the name is ascertained, it shall be substituted in the proceedings'. Under this section it is claimed that the suit is properly brought against *'the heirs of Otis Reynolds'*. Now what is it that is not known? 1. That Otis Reynolds had any heirs. 2. What relation his heirs bore to him, if he had any. 3. Whether they bore his name or some other name. 4. Whether they were males or females, infants or adults, sane or insane; whether there is one or one hundred. Surely it was not the want of a knowledge of the *'precise name'*, but it was unlimited ignorance of there being even any body to name or any body to describe. The code contemplates that the defendant shall be a known person, who can be described with some certainty. That some indefinite knowledge shall exist as to the name, and it is only that which falls short of precision that can be supplied by a description of the person.

"The code certainly does not authorize the bringing of a suit in this way, by describing defendants by a class name, without reference to their number or condition. **Such a description of a person is no description whatever. It gives no guide by which the officer can be governed in making service.** *The suit might as well have been brought against a 'Yankee', a 'Hoosier', or a 'Buckeye'."*

The statute involved in the Mason case, *supra,* was enacted in the same month and by the same legislature that passed the act held void by this court in *Webster v. Reid,* 11 How. 437. Both acts were, no doubt, passed for the same general purpose of devesting the titles of ignorant Indians.

The Mason case, further, *proves too much.* It was held that the decree rendered on publication was not void although there was

> "fraud both in intent and in fact, in the action of the parties, their attorneys, and the court; that the defendants were among the persons defrauded; and that the plaintiff was sole judge of the court at the time the decree was rendered"!

See *Howard v. De Cordova,* 177 U. S. 609.

Foxcroft v. Barnes, 29 Me. 128,

holds merely that the party claiming under a judgment of partition had proved a sufficient title without relying on the judgment; that the other party, contesting the validity of the judgment, showed no title in himself; and that it was consequently *not*

> "necessary to consider or determine what effect the R. S. c. 121, Secs. 31 and 33, might have had, if the demandant had relied upon the proceedings and judgment in partition without exhibiting any other title" (p. 132).

The court intimated, however, that the judgment in partition could not be disturbed *by a possessory action,* but did not express itself as to the effect thereof *if an action were brought to try the right.* As will be seen later the judgment in partition only severed *the possession of the co-tenants and did not devest or create titles.*

Cook v. Allen, 2 Mass. 462, was also *a possessory action;* not an action to try title. The court, indeed, expressly said (p. 468):

> "The question is, whether the record of partition made upon Reed's petition concludes the tenant in this action, in which the *jus possessionis only* is to be tried."

and again (p. 473):

> "But if a right of possession passed by the judgment, so that he became sole seised under it, then, *if the owner should bring his writ of right, and evict him by a title paramount,* he would be entitled to a new partition of the residue."

In other words, the judgment in partition dealt only with possession; that which was an undivided possession became a sole seisin. By the judgment the parties were put into possession, and no mere possessory action would lie to evict them. Within the period of limitations, however, a writ of right would lie to try the title (see the Tyler case, 175 Mass. [illegible], 55 N. E. 812, at p. 824).

Nevertheless, it is submitted that the Cook case draws an erroneous analogy from the English statute.

In a partition case in the House of Lords,

Atkinson v. Holtby, 10 H. L. C. 314, 324,

it is distinctly decided:

> "The heir-at-law is not before this House, and has not been before either of the courts below. In all probability he has no claim whatever. Such appears to have been the opinion of the Master of the Rolls and the Lords Justices; but it is proper, I think, that we should say that our decision does not prejudice any person who is not before this House, or was not before the courts below. If he has any right, *if it is a right paramount, it may be put in force hereafter.*"

Rogers v. Tucker, 7 Ohio St. 418, does not appear to have any bearing; and, if it has, is disregarded in

McBain v. McBain, 15 Ohio St. 337.

In the latter and later case it was held that a *named* party who was served by publication was not estopped by a judgment in a partition suit from asserting his paramount title.

Said the court:

> "We are equally unable to see how the proceeding in partition could have the effect to impart any title to McBain. 'It is well settled' says this court—*Tabler v. Wiseman et al.*, 2 Ohio St. 211—'that such a proceeding does not decide title or create any new title. It merely dissolves the tenancy in common, and leaves the title as it was, except to locate such rights as the parties may have in distinct portions of the premises, and to extinguish it in others.' It is claimed, however, that Daniels and those claiming under him are *estopped* by the proceeding in partition from setting up his title. *It is sufficient answer to this claim to say that Daniels had no actual notice of the partition, and was not in fact a party to it otherwise than by publication of notice.*"

Nash v. Church, 10 Wis. 303, pp. 244, 253, is relied on by counsel to sustain the supposed doctrine that adversary titles may be concluded in a proceeding in which "unknown owners" are attempted to be brought in by publication.

This case was decided in 1860, before the 14th amendment, and no constitutional question was argued or discussed. The court proceeded solely on a construction of the statute. The case is, however, very illuminating. It was argued by the respondent, upon a construction of the statute, that the unnamed parties proceeded against as unknown were nevertheless concluded. Said the court:

"The positions assumed by the respondents' counsel in the argument of this case, I must say, appeared to me novel and somewhat extraordinary. It seemed to me that if they were correct, we should, so far as the appellants are concerned, be compelled to give one of the most unjust judgments ever pronounced in a court of justice; that every sentiment of equity and justice demanded of us to uphold them in their title and possession, or at least to give them their day in court, for the purpose of establishing them. The idea that, under our statute for the partition of real estate, a party in the quiet and undisturbed possession of his property, could be stripped of it by a judicial proceeding, of which he was entirely ignorant, struck me as being so flagrantly and enormously unjust and oppressive, that I thought it could not be the law. *The taking of a valid title of a person in possession from him and transferring it to another having no right to it by a proceeding of which the owner has no knowledge,* **and in which his title was not directly adjudicated against him, nor the attention of the court directly called to it,** *exhibits a most alarming defect in justice. Such a proceeding is opposed to all our notions of law and justice, and we search with anxiety for some mode of escape from it.* Such were my impressions of this case at the argument, and, although I am compelled to adopt the views of the respondent's counsel as the correct law, yet I must confess I have not been able, nor am I desirous to rid myself of them.

"It is not by the rules of the common law, which courts are at liberty to mould and modify so as to meet the ends of justice, but by the declarations of the legislature upon a subject confessedly within their control, that we are to determine this case. They, not the court, are responsible for the unjust consequences which may flow from its decision. They have prescribed the

> mode in which parties shall be brought into court, the form of the proceedings, and the effect of the judgment in actions like that under which the respondent claims title. The same power which authorized the wrong must apply the remedy."

Upon the supposed authority of *Cook v. Allen, supra,* the court held that the statute required the construction contended for. But the court points out (and this is the gist of the matter with reference to such cases) (p. 260):

> "The hardship of the present case arises from the omission of our legislature to do what that of Massachusetts, Maine and many other states have done, namely, to provide that the rights of those persons unknown who have not appeared and answered, and who claim by paramount title, or to hold in severalty the whole or any part of the premises mentioned in the complaint, shall be excepted from the conclusive operation of the judgment. For the sake of justice to these defendants it is to be wished that such exception had been made. It will be observed in the case above cited, that the conclusiveness of the judgment as to the right of possession only is affirmed. The action being by writ of entry, the right of possession alone was contested. *The effect of the judgment as to Allen was only to sever the possession and put Reed and his assigns in. The court expressly said that he was still at liberty to assert his paramount or several title by writ of right.* See R. S. Mass., 1836 ch. 103 sec. 38; *Pierce v. Oliver,* 13 Mass., 211."

Of course, the decision was a judicial inadvertence, and a similar one could not now be rendered anywhere; but the aberration is instructive as showing how, in perhaps the single, or at least singular, in-

stance prior to the Torrens experiment, where a statute was sustained attempting to bind unnamed persons, not parties or privies, in a proceeding only quasi in rem, by the imperative operation of the judgment, the result, and the immediate result, was not to furnish evidence of validity by acquiescence, *but a prompt repudiation of the heresy, by amendment conforming to the sane, safe and sound common law due process.*

If in partition suits "unknown owners" be a sufficient designation of co-tenants, when their names can not by the exercise of reasonable diligence be ascertained, it is because *they are not to be deprived of their property by the judgment, which operates merely to sever the unity of possession.*

In *Molett v. Foxcroft,* 1 Story 474, Fed. Cas. No. 8989, it was held that a judgment in such a suit is no bar to an action concerning the title.

Said Justice Story:

> "The present suit is a writ of right, and no judgment in a writ or petition for partition will constitute any bar to the maintenance of a writ of right between the same parties. A writ of partition, or a petition for a partition, which is but a substitute for the former, is a mere possessory action; and, at most, a judgment in a possessory action can bar only an action of as high a nature, that is, a possessory action; for the judgment only establishes the right of possession. But a writ of right is in no just sense a possessory action. It is founded upon the mere right, and not upon the possession; and the general issue or mise is but a trial of the mere right. The plea of the demandant of a sole seisin, to the petition of partition, even if it were

> found against him, would only disprove his sole seisin at the time when the petition was filed. It would not prove, that he was not so seised at any prior time within the last twenty years, which is the statute limitation of writs of right. It could not be pleaded as a bar to a writ of right, or as an estoppel thereof; since it did not, and could not try the same question, who had the better mere right. The most, that can be said, is that it is admissible as evidence between the same parties. But of what is it evidence? Certainly only of the very fact of sole seisin put in issue by the pleadings; and that can properly apply only to sole seisin at the time when the petition was filed."

The same principle is recognized in

Wade v. Deray, 50 Cal. 376, 380,

where it is held that

> "It is well settled that a decree or judgment in partition has no other effect than to sever the unity of possession, and does not vest in either of the co-tenants any new or additional title. After the partition each had precisely the same title which he had before; but that which before was a joint possession was converted into a several one."

See also decision of the Court of Appeals, Ninth Circuit, in *Pacific Bank v. Hannah,* 90 Fed. 72.

There can be no ground for asserting that by such a judgment a person is deprived of property. He still has an opportunity to assert his title to the premises partitioned, *unless he actually appeared in the action and by his conduct there is estopped from asserting title.* We do not understand that the statutes, cited in the court below in the brief of counsel, attempt to authorize

any judgment by mere force of which a person invited into the proceeding by the designation "unknown owner" is concluded as to his title. Since he is still at liberty to assert his title, within the period of the statute of limitations, he cannot be said to be deprived of his property by such a proceeding.

It is true that modern statutes permit questions of title to be considered and determined in partition suits. This, of course, may be done *inter partes*. We believe, however, as to persons brought in only by the designation "unknown owners" who have no notice and do not appear, that such statutes cannot, and do not purport to, bar their paramount titles. Possession may be taken under the decree giving a *sole seisin*, and this possession, if adverse, may by lapse of time ripen into title.

It is to be remembered, also, that in a partition suit the parties who ask partition are bound to show their title, and that, in the absence of fraud, in doing so *they necessarily show the undivided interests of their cotenants, for such interests always come from a common source.*

4. *Tax and eminent domain proceedings.*

No principle could persist for a single generation if it were not for judicial discrimination. Legitimate exceptions exist in every living system of jurisprudence. One of the chief duties of courts is to confine exceptions within their proper limits in order that the principle may endure.

As well said in *State v. Guilbert,* 50 Oh. St. 575; 47 N. E. 551, 557, speaking to the precise point involved here:

> "If it is borne in mind that the questions here considered *concern the adversary rights of persons in property,* it will sufficiently distinguish the cases which involve the police power, or the right of eminent domain, or the right of taxation."

As said by Justice Field for the court in *Hagar v. Reclamation District,* 111 U. S. 701, 708-9:

> "Undoubtedly, where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; *so, also, where title or possession of property is involved.* But where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax and the manner in which its amount is determinable. The necessity of revenue for the support of the government does not admit of the delay attendant upon proceedings in a court of justice, and they are not required for the enforcement of taxes or assessments. As stated by Mr. Justice Bradley, in his concurring opinion in *Davidson v. New Orleans*: 'In judging what is "due process of law" respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain or the power of assessment for local improvements or some of these; and if found to be suitable or admissible in the special case, it will be adjudged to be "due process of law", but if found to be arbitrary, oppressive and unjust, it may be declared to be not "due process of law" '."

And again in *Ex parte Howard,* 9 Wall. 175:

> "There is, indeed, a class of cases affecting the personal *status* of parties" (also other cases of the same class) "in which a judgment necessarily binds the whole world, *but it is not of these we are speaking; we refer to judgments at law or decrees in chancery, affecting rights of parties to property. They bind only the parties before the court and those who stand in privity with them.*"

Conclusion.

The main argument in support of the act is that of "necessity"—the baseless assumption that unless the act be held valid it is put beyond the power of the state "to quiet the title to realty". Does this assumption—this assumed "necessity"—justify *any* procedure however inadequately safeguarded? The state *can* exercise all the power that public necessity, or even convenience, demands, and that without subverting the tried principles that have so long and universally been the sure foundations of judicature.

By our present system great, sometimes even merciless, potency and effect legitimately attend the judgments and decrees of courts. Any innovation tending to weaken and destroy the wise safeguards afforded by due process of law, while retaining the attributes of judgments which presupposed their observance, may well cause the anxiety confessed by Justice Holmes, and surely demands the most careful and deliberate scrutiny. Prominent and essential among these safeguards are the

requisites of a real and substantial notice, a real *controversy,* and last but not by any means least, the cardinal principle that except in proceedings strictly *in rem,* the judgment binds only parties and privies. The due process which preserves this admits of all desirable and expedient exercise of legislative power.

If it is desired to bind third or unnamed or unknown persons, not parties to the action, this may be readily and justly accomplished. An official and consequently unprejudiced investigation and diligent inquiry can be required; claimants thus ascertained can and must be made parties and served. Publication may then be made inviting into the proceeding all other persons who claim any interest; the judgment may of its own proper force and effect conclude the rights of all who have been made parties, and also the rights of all who have come in under the publication. The successful party may be permitted to go into possession under the decree and if that possession is uninterruptedly maintained for a reasonable period the rights of all who were entitled to sue for possession may be barred. By fees paid by petitioners an insurance fund may be provided for the protection of persons who in spite of these precautions have nevertheless been deprived of their property. Other safeguards, furnished by sound examples of the Torrens System, may well be considered and adopted. If the public convenience requires that the rights of all the world be barred then due process no less urgently demands that adequate precautions be taken to minimize private ruin and despoliation; and if, in spite of all due

and reasonable safeguards, it should nevertheless happen that in a rare case the property of one man should unjustly be transferred to another, the insurance fund would furnish compensation and mitigate the residuum of hardship.

Few more important cases than this have come before the court. In many states the complexity of the records of title has already led to agitation for a method of simplification. The Torrens System, in one form or another, with or without adequate safeguards, has already been tentatively put in operation in a few states and is under discussion in others. As time goes on one after another of the states will, no doubt, enact similar legislation. The end is no doubt both desired and desirable. But how about the means? Shall *any* act be justified because it has the desired end in view? Because the end is a fair one shall this court sustain the most extreme example of lack of precaution and safeguards ever devised or conceived?

We do not now know how the rights of a citizen may be more seriously infringed, but experience nevertheless teaches that the usurpation of majorities does not halt.

In the words of Justice Bradley, often approvingly quoted by this court:

> "Illegitimate and unconstitutional practices get their first footing in this way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property *should be liberally construed. A close and literal construction deprives*

them of half their efficacy and leads to the gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon their motto should be *obsta principiis*" (116 U. S. 635).

Need it here be pointed out that if the McEnerney Act be good, hardly any act that may be passed by any state along this line can be held bad, however crude and imperfect it may be, however lacking in safeguards and abounding in injustice, or tending still further to fritter away substantial and fundamental guarantees and throw infectious doubt upon the hitherto accepted rules governing judicial action?

Respectfully submitted,

CHARLES PAGE,
EDWARD J. MCCUTCHEN,
SAMUEL KNIGHT,
C. IRVING WRIGHT,
Solicitors for Complainant and Appellant.

S. F. No. 4646

In the Supreme Court of the State of California.

Title and Document Restoration Company (a corporation),
Petitioner,

vs.

Hon. Frank H. Kerrigan, Judge, etc.,
Respondent.

By the Court:

The petition for rehearing is denied. In response, however, to some suggestions contained in the petition, we desire to definitely express our view regarding a point left undecided by the original opinion. On further consideration we are satisfied that section five of the act requires the plaintiff to set forth in his affidavit a showing of the inquiry made by him to determine whether or not there is any other person "who claims "or may claim any interest in or lien upon the prop- "erty, or any part thereof, adversely to him". We are not to be understood as passing, in this proceeding, on the sufficiency of the affidavit filed by the petitioner in the court below. The only questions argued here were those involving the constitutionality of the act, and the question whether the affidavit complied with the requirements of the act was neither presented nor considered. Notwithstanding the issuance of the writ here ordered, the sufficiency of the affidavit may be inquired into by the superior court when judgment is applied for.

Filed January 5, 1907.

FRANK C. JORDAN, Clerk.

By Erb, Deputy.

I, F.L. CAUGHEY, Clerk of the Supreme Court of the State of California, do hereby certify that the two preceding orders are true and correct copies of orders filed January 5th, 1907, and February 4th, 1907, respectively, and now on file as shown by the records of my office.

WITNESS my hand and the Seal of the Court, this 23d day of September, A.D., 1910.

F.L. CAUGHEY,
Clerk.

By J. G. Grant
Deputy Clerk.

S. F. No. 4646

In the Supreme Court of the State of California.

Title and Document Restoration Company (a corporation),
Petitioner,
vs.
Hon. Frank H. Kerrigan, Judge, etc.,
Respondent.

By the Court:

The opinion filed January 5, 1907, on denying the petition for a rehearing in the above-entitled cause is hereby withdrawn, pending further consideration and final determination of the question therein discussed, said question being necessarily involved in Hoffman v. Superior Court, S. F. No. 4755, this day argued and submitted on briefs to be filed.

Filed February 4, 1907.

F. L. CAUGHEY, Clerk.

By Dryden, Deputy.

Office Supreme Court U. S.
FILED
MAR 21 1910
JAMES H. MCKENNEY,
Clerk.

In the Supreme Court

OF THE

United States.

October Term, 1909

AMERICAN LAND COMPANY
(A Corporation),
Complainant and Appellant,

vs.

LOUIS ZEISS,
Defendant and Appellee.

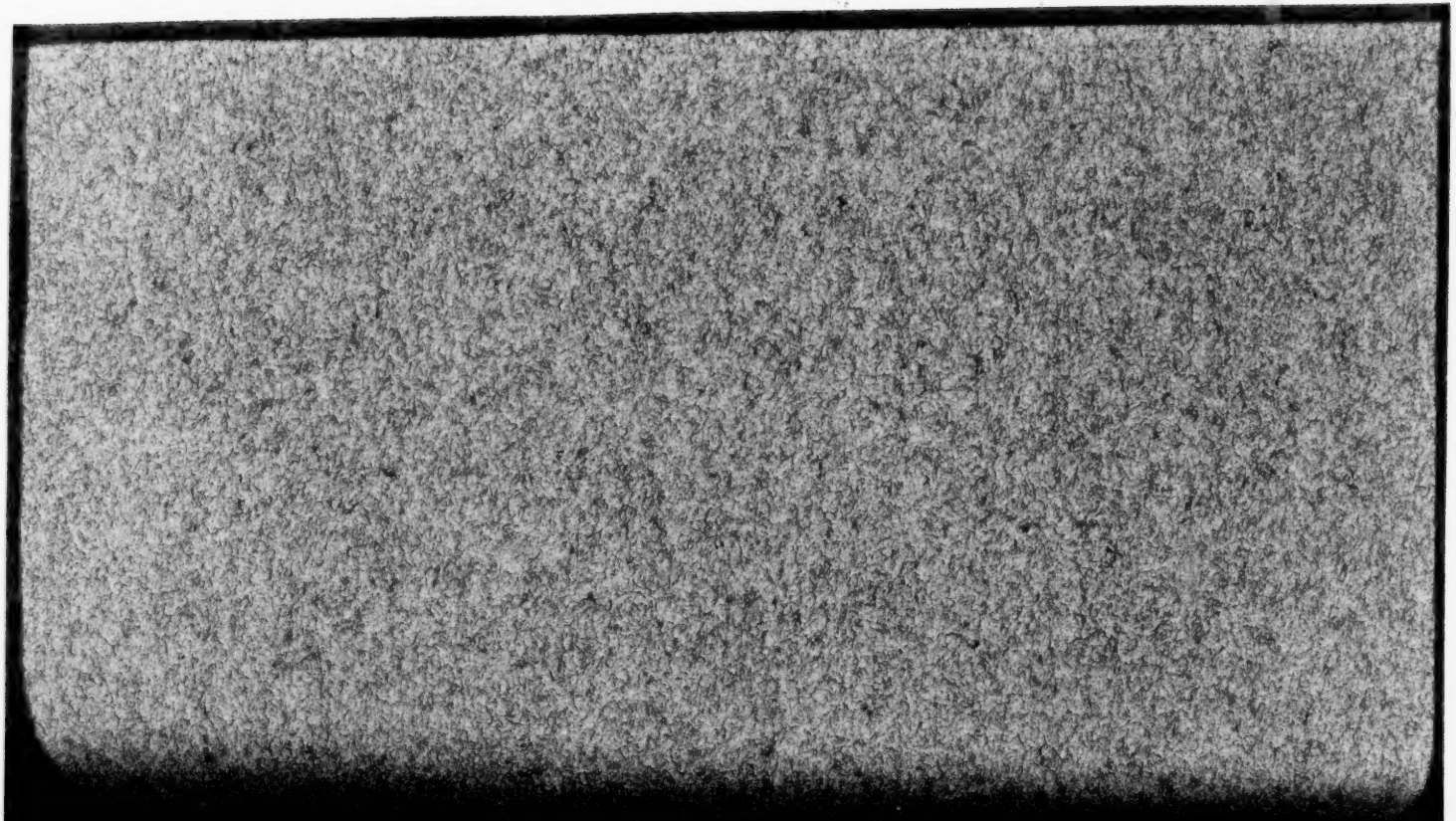
230

Brief This by Appellant in Support of the Validity of the Statute of California Here Attacked.

Filed this ..... day of March, 1910.

JAMES H. MCKENNEY, Clerk.

By ..... Deputy Clerk.



No. 1662.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

AMERICAN LAND COMPANY
(a Corporation),
Plaintiff and Appellant,
vs.
LOUIS SEIBE,
Defendant and Appellee.

Brief in Support of the Judgment Rendered by the Circuit Court.

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Solicitors for Appellee.

Filed this 8th day of February, A. D. 1909.

FRANK D. MONCKTON, Clerk.

By ..... Deputy Clerk.

INDEX

TO

BRIEF IN SUPPORT OF THE JUDGMENT RENDERED

BY THE

CIRCUIT COURT.

I. **PRELIMINARY MATTERS** 4

A. The Nature of the Case at Bar 4

B. The Emergency Which Rendered Necessary the Act Here Attacked, the Purpose of the Statute and the Need of a Remedy Such as It Provides 5

C. The Provision of the Statute Here Involved 11

D. Statement of the Contention of Appellant 15

E. Statement of the Propositions Considered in This Brief in Support of the Validity of the Act 16

II. **THE STATE IS SOVEREIGN OVER LAND LYING WITHIN ITS BOUNDARIES BY WHATEVER PERSONS OWNED, AND MAY MAKE AN ADJUDICATION AS TO THE TITLE TO SUCH LAND BINDING AND CONCLUSIVE UPON ALL PERSONS** 18

III. **"DUE PROCESS OF LAW" WITHIN THE MEANING OF THE FEDERAL CONSTITUTION REQUIRES NO PARTICULAR FORM OF PROCEDURE. ITS ESSENTIALS ARE MATTERS OF SUBSTANCE RATHER THAN OF FORM. ANY PROCEEDING AFFORDS DUE PROCESS OF LAW WHICH, BEING REASONABLY SUITED TO THE NATURE OF THE CASE, GIVES REASONABLE NOTICE TO THE PARTIES AFFECTED AND AFFORDS FAIR OPPORTUNITY FOR DEFENSE** ... 27

A. The Meaning and Essentials of "Due Process of Law" in General 27

B. The Failure of a Party in a Particular Case to Receive Actual Notice Where Constructive Notice to Him is Constitutionally Permissible Cannot Affect the Validity of Such Constructive Notice as Affording Due Process of Law 32

IV. **IT IS WITHIN THE POWER OF A STATE TO PROVIDE A PROCEEDING STRICTLY IN REM TO ESTABLISH AND QUIET THE TITLE TO REAL PROPERTY WITHIN ITS LIMITS** 39

V. **THE PROCEEDING PRESCRIBED BY THE STATUTE IS ONE "STRICTLY IN REM"** 57

VI. WHETHER OR NOT THE PROCEEDING AUTHORIZED BY THE ACT IS ONE STRICTLY IN REM OR SUBSTANTIALLY IN REM IS IMMATERIAL. IN BOTH JURISDICTION RESTS UPON THE SAME BASIS AND BOTH HAVE EQUAL POTENCY AS TO THE RES 70

VII. PROCEEDINGS TO DETERMINE THE RIGHTS OF UNKNOWN CLAIMANTS ARE CONSTITUTIONAL, AND THE RIGHTS OF SUCH CLAIMANTS MAY BE FORECLOSED IN PROCEEDINGS EITHER STRICTLY OR SUBSTANTIALLY IN REM 110

VIII. THE NOTICE TO UNKNOWN CLAIMANTS PROVIDED BY THE ACT UNDER DISCUSSION IS REASONABLE, AND CONSTITUTES DUE PROCESS OF LAW 155

A. The Act Employs Every Mode of Constructive Service Known to the Law 155

B. The Notice to Unknown Claimants is Not Only as Full as Could Be Devised, But is of the Same Efficacy as That Afforded by Any Proceeding in Which the Rights of Such Persons May Be Concluded 160

C. The Contents of the Affidavit Filed With the Complaint Present No Question of Due Process of Law 172

D. The Proceeding Prescribed by the Act is Conclusive Upon Unknown Claimants (Not Only as a Judicial and Binding Determination of Their Rights), But as a Statute of Limitations 175

IX. THE PROCEEDING PRESCRIBED BY THE ACT IS JUDICIAL IN CHARACTER AND IS NOT A MERE DECLARATION OF RIGHTS UPON EX PARTE APPLICATION 179

A. Analysis of the Contention That the Proceeding Prescribed by the Act is Not a Judicial Proceeding 180

B. The Contention Involves No Question of Due Process of Law Under the Fourteenth Amendment 182

1. The Suggestion That the Proceeding Prescribed by the Act is Not Judicial Concerns Only the Rights of the Legislature Under the State Constitution to Confer Jurisdiction Over Such Proceedings Upon the Courts of the State. The Decision of the State Supreme Court That the Proceeding is Strictly "Judicial" is Decisive of this Question 182

2. The Contention That the Proceeding Prescribed by the Act is "Non-Judicial," Rests Upon No Claim That Any Element or Essential of "Due Process of Law" is Denied a Party, But Upon the Suggestion That the Legislature Has No Right to Create a "Cause of Action" for the Discovery and Settlement of Unknown Claims to Real Property 184

3. The Fourteenth Amendment Does Not Control the Power of a State to Prescribe the Basis of Relief in Its Courts or the Forms of Procedure Therein..... 187
4. The Case at Bar Presents No Question as to the "Judicial" Nature of a Proceeding Under the Act Where There Are No Undisclosed Claimants. Such a Case Can Never Involve a Deprivation of Property. 188
5. The Case at Bar Presents No Question of the Rights of a Court in a Proceeding Under the Act to Determine the Validity of Claims Non-Adversary in Character. The Interests Claimed by Appellant and Appellee Are Adverse and Conflicting..... 190

C. The Opinions Rendered by the Supreme Court of California Show That the Proceeding Prescribed by the Act is Unquestionably "Judicial"..... 191

D. The Use of Quotations From Authorities in the Brief for Appellant 199

E. While it is Unnecessary for This Court to Consider or Determine Whether Proceedings Under the Act Here Involved Are "Judicial" Within Any Rule as to the Separation of Government Powers, There Can Be No Doubt That They Are Essentially and Strictly Judicial in Character 202
1. Definition of "Judicial Power" and "Judicial Proceedings" 203
2. "Special Proceedings" as Well as "Actions" Are "Judicial Proceedings" 206
3. The Power Here Claimed to Be "Non-Judicial" Has in Every Other Case Been Held or Assumed to Be so Strictly "Judicial" That it Could Be Vested Only in a Court..... 209
4. A Complaint Under the Statute Does State a "Cause of Action" 211
5. The Legislature Has Declared That the Destruction of Records Casts a Cloud Upon the Title to Property, And Has Here Provided a Proceeding for the Removal of That Cloud. The Complaint States a "Cause of Action" as in Any Suit to Remove a Cloud From Title 216
6. Even in an Ordinary Suit to Quiet Title the Allegation That the Defendant Has Made an Adverse Claim Has No Purpose Except to Compel the Production of Such Claim if it Exists, And a Denial of the Allegation is Immaterial..... 217
7. The Cause of Action Stated in a Complaint Under the Act is Analogous to That in an Equitable Suit to Restore a Lost or Destroyed Instrument..... 220

8. Under the Act All Claimants in the Property Are Defendants and Parties to the Action Whether They Appear or Suffer a Default. The Summons is Not a Mere "Solicitation to Litigate"... 221
9. In a Proceeding Under the Act All Unknown Claimants Are Adverse Parties From the Beginning. The Mere Possibility of Adverse Parties Would, However, Be Sufficient to Render a Proceeding "Judicial"..... 225
10. Even "Ex Parte" Proceedings May Be Judicial..... 227
11. Various Classes of Proceedings Analogous to Those Authorized by the Act Here Attacked..... 229
(a) The Torrens Acts of the Various States and the Burnt Records Act of Illinois..... 229
(b) Proceedings for the Confirmation of Tax Titles, etc. 230
(c) Suits Under General Equity Jurisdiction to Establish Title 230
(d) Generally, Proceedings Instituted by Petition, Prosecuted by Citation, and Involving the Same Considerations as to Controversy," "Course of Action" and "Parties" as Are Here Suggested.. 240
12. The Proceeding Prescribed by the Statute is Not "Ex Parte"..... 243
13. The Proceeding Prescribed by the Statute Involves No Declaration of "Future Rights"..... 244

F. Review of the Proposition Discussed and Authorities Cited in the Brief For Appellant..... 247
1. The Proposition Discussed and Authorities Cited in Appellant's Brief Upon the Judicial Nature of "Ex Parte" Applications for a Declaration of Undisputed Rights Are in No Way Relevant to the Case at Bar.. 247
2. The Authorities Dealing With the Judicial Character of Proceedings Under the Wright Irrigation Act Do Not Involve the Question Here Presented..... 251
3. Probate Proceedings Are Neither "Ex Parte" Nor "Non-Judicial"..... 252
4. Insolvency Proceedings Are Judicial in Character..... 253
5. A Court May Be Empowered to Render Declaratory Decrees 254
6. The Act is Not "Void" as Depriving Federal Courts of Their Jurisdiction 255
7. Other Suggestions Contained in the Brief for Appellant. 257
8. The Possibility of Fraudulent Proceedings Under the Act is Not Only Small, But Entirely Irrelevant to Any Question Here Involved..... 258

X. CONCLUSION 260

No. 1647.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

AMERICAN LAND COMPANY,
(a corporation),
Complainant and Appellant,

vs.

LOUIS ZEISS,
Defendant and Appellee.

BRIEF IN SUPPORT OF THE JUDGMENT RENDERED BY THE CIRCUIT COURT.

This proceeding involves an attack by the appellant on the constitutionality of the statute passed by the Legislature of the State of California and approved June 19, 1906 (Stats. Cal., 1906, p. 78), providing for the establishment and quieting of title to real property in case of the loss or destruction of public records.

The validity of the act has already been sustained by the Supreme Court of the State of California, in an opinion concurred in by all the members of the Court. All of the points here presented were urged before the State tribunal and by the same counsel who appear for appellant in the case at bar. All are considered and we believe disposed of in the elaborate opinion delivered by Mr. Justice Sloss in

> *Title Document and Restoration Company* vs. *Kerrigan*, 150 Cal., 289; 88 Pac., 356; 119 Am. St. Rep., 199; 8 L. R. A. (n. s.), 682.

Within a few months after that decision, the validity of the Torrens Act of California was assailed before the same Court. That act and the statute here involved are in large measure alike. The principles involved are identical, and the same points were again urged by the same counsel in support of the claim that the statute was unconstitutional. They were again discussed by the Court, and in an opinion rendered by Mr. Justice Shaw (and concurred in by all of the justices who participated in the decision) were held untenable.

> *Robinson* vs. *Kerrigan*, 151 Cal., 40; 90 Pac., 129; 121 Am. St. Rep., 90.

Shortly thereafter, the act here under consideration was for the second time brought before the Supreme Court of the State and its validity questioned. Again the attack was led by counsel for appellant here. Again the points twice before presented and disposed of (and here pressed upon this Court) were urged. Again the Court,

speaking through Mr. Justice Shaw, considered the validity of these contentions, held them untenable, and sustained the act as constitutional.

Hoffman vs. *Superior Court,* 151 Cal., 386; 90 Pac., 939.

The opinions of the Supreme Court of California rendered in the cases to which reference has been made, might well be submitted as a complete and sufficient answer to the contentions of appellant in the case at bar. The grave consequences which would follow a contrary conclusion by this Court are, however, sufficient excuse for the fullest possible presentation of the principles and authorities which establish the validity of the statute here assailed.

Apart from all considerations of public interest demanding such relief as the statute affords, the number of persons who have acted in reliance upon the validity of judgments obtained in conformity with its provisions, the extent to which those judgments are regarded and have been treated as affording a basis for record title to property, and the number and importance of the transactions based upon a faith in their validity declared in prior adjudications, show how little short of disastrous would be a decision which at this date should hold such decrees void or less than conclusive.

Induced by these considerations, the present brief has been prepared and is respectfully submitted in support of the judgment from which this appeal is taken.

I.

PRELIMINARY MATTERS.

A. The Nature of the Case at Bar.

This suit is in form one to restrain the enforcement of a judgment obtained by the appellee in the Superior Court of the City and County of San Francisco under the provisions of the statute referred to. The complainant, a Nevada corporation organized as lately as March, 1908, claims as the grantee of certain persons who, the bill alleges, were, prior to their conveyance to the complainant, the owners of a reversionary interest in certain real property located in San Francisco. The bill alleges that in the year 1906 the defendant Zeiss instituted a proceeding in the Superior Court for the City and County of San Francisco to establish and quiet his title to certain real property in San Francisco including that here involved.

It is conceded that the proceedings in that action were in strict conformity with the requirements of the statute. No fraud upon the part of the appellee is alleged in the bill, and it is admitted that if the provisions of the act in so far as they relate to the interests of unknown owners are valid and constitutional, the judgment obtained by the appellee is conclusive evidence of his title to the property. It is contended, however, that the proceedings were, as to the plaintiff's assignors, without due process of law; that the defendant should be enjoined from asserting the validity of the judgment as against complainant, and that the decree should be adjudged void and removed as a cloud upon the latter's title.

In the Circuit Court a demurrer was interposed to the bill. The opinion rendered by the Court on sustaining the demurrer and dismissing the bill is contained in an appendix to appellant's brief opposite page 203.

Referring to the two cases in which the Supreme Court of California "had before it the precise question here presented" and in which "upon an elaborate consideration its conclusion was against the present contention of this complainant and the validity of the act was upheld in its entirety," the learned judge stated that in one of those cases he had appeared as counsel *amici*, in support of the views which the Court had adopted. No new points had been presented and in accordance with the principles expressed in those cases, the demurrer was sustained and the bill dismissed. The present is an appeal from that order.

B. The Emergency Which Rendered Necessary the Act Here Attacked, the Purpose of the Statute and the Need of a Remedy Such as It Provides.

Before passing to a discussion of the particular questions raised by this proceeding, it is proper to briefly direct the attention of the Court to the conditions which compelled the enactment of the statute here attacked and to the necessity for some remedy such as it affords.

The act was passed to meet the emergency created by the disaster of April 18, 1906. The conflagration of that and succeeding days destroyed practically every evidence of title to real property in San Francisco. On approximately ten square miles of the city's area the fire obliterated all improvements and evidences of possession. To-

gether with these improvements, which for years had stood as the open assertion of ownership, were destroyed the monuments and marks by which the various parcels of property were delimited and their boundaries could be ascertained. In most instances the deeds and other muniments of title in the hands of owners of real property were burned. Finally, and of most importance to the present discussion, the fire destroyed all public records of title to property in San Francisco, records upon which for more than half a century the security of those titles had depended, and upon the existence of which rested the entire system of sale and transfer of real estate.

The loss and destruction of public records was practically complete. The following is a statement of the books containing the principal records which were lost and fairly indicates the extent of the disaster in this regard:

Books	*Before Fire*	*Lost*	*Saved*
Mortgages	1465	1464	1
Declarations of Homestead	69	68	1
Liens	96	95	1
Attachments	80	76	4
Deeds	2212	1559	653
Release of Mortgages			2
Leases		all	
Judgments		all	
Miscellaneous		all	

The grievous consequences of this destruction of public records require no extended exposition. All real prop-

erty in the City and County of San Francisco was rendered practically unmerchantable. The sale and transfer of real estate under the system which had prevailed in California since the earliest times was (as pointed out by Mr. Justice Sloss in *Title & Document Restoration Company* vs. *Kerrigan*, 150 Cal., 289, in language hereinafter quoted) entirely based upon the public records of title. A perfect title meant one deducible of record. *Gwin* vs. *Calegaris*, 139 Cal., 384. With the destruction of those records the title to every piece of land in San Francisco was left without public, and in most cases without any, evidence of either its validity, its nature, the defects attaching to it, or the encumbrances which rested upon it. In short, the most valuable land of the State was practically withdrawn from commerce, while the title of its owners and the claims of lienors and others with respect to it were left not only without public record but without means of establishment.

Speaking of a similar condition following the Chicago fire and commenting on the necessity for the "Burnt Records Act" (a statute practically the same as that here involved), the Supreme Court of Illinois said:

> "*The condition of property owners in Chicago after the great fire of October, 1871, was appalling, demanding legislative interference.* A great evil had befallen them, which this act was designed to remedy. It is emphatically a remedial act and in accordance with a well established canon, it must receive a liberal construction."
>
> *Smith* vs. *Stevens*, 82 Ill., 554.

Compare also *Gormley* vs. *Clark*, 134 U. S., 338, involving the Illinois Burnt Records Act in which the

"numerous decisions" declaring that "under the circumstances" it "was not unreasonable but demanded as a matter of safety, in a great emergency" are referred to with approval.

In San Francisco no less than in Chicago the "appalling" condition resulting from the loss of public records "demanded legislative interference." Accordingly, one of the principal reasons for the convocation of the legislature in extraordinary session was the necessity, expressed in the Governor's proclamation, of providing some method of restoring record title to land in San Francisco.

To meet this necessity the legislature passed the statute which is here the subject of attack. The act was drawn with great care. The procedure adopted was fully sanctioned by precedent and was substantially identical with that prescribed by other enactments the validity of which had been repeatedly sustained. The act followed closely the lines of the "Burnt Records Act" of Illinois passed to meet a similar emergency, and provided for a procedure substantially the same as that of the statutes enacted in different states for the establishment of title to land under the Torrens system of registration.

The purposes of the act as well as the necessity which gave rise to its passage are well stated by Mr. Justice Sloss in *Title & Document Restoration Company* vs. *Kerrigan,* 150 Cal., 289, 305:

> "The general purpose of the statute is plain. It was intended to provide a method whereby owners in possession of real estate in counties where the records are destroyed to such an extent as to make

it impossible to trace a record title may secure a decree which shall furnish a publicly authenticated evidence of title. It is hardly necessary to point out that under the system of registration of land titles which has grown up in all of the states of this Union it is practically essential to the security of ownership in real property that there exist some method by which the title can be made clear of record. Without regard to the effect of duly recorded instruments as constructive notice (whether or not the record remains in actual existence), the registration of titles has become so thoroughly imbedded in our system of dealing with lands that a title which cannot be traced and established by some form of public record is practically unmerchantable. It is of course true that for many centuries lands have been transferred in England, whence we have, in the main, derived our system of real property law, without any considerable resort to a public recording scheme. But in this country the system of registration has become so completely established that the courts can take judicial notice of the fact that in the great majority of cases parties dealing in real estate rely for the proof of their titles upon the chain of title that will be disclosed by an examination of the records, and in a small degree, if at all, upon the possession of the original instruments composing that chain. In many instances, indeed, these instruments are not preserved for any great length of time.

"It is also a matter of common knowledge that in the City and County of San Francisco, at least, if not in other counties, the disaster of April last worked so great a destruction of the public records as to make it impossible to trace any title with completeness or certainty. That some provision was necessary to enable the holders and owners of real estate in this city to secure to themselves such evidences of title as would enable them not only to defend their possession, but to enjoy and exercise the equally important right of disposition, is clear.

> These considerations are suggested, not with a view to arguing that the necessity for some act of this kind affords any ground for disregarding constitutional provisions, if the statute be found to conflict with such provisions, but rather as a guide to determine the real scope and purpose of the act, and to emphasize the rule so often laid down by all the courts that in passing upon the constitutionality of an act of the legislature every presumption and intendment in favor of the validity of the enactment are to be given effect."

What has been said and what is matter of judicial knowledge to this Court indicates sufficiently the necessity for the remedy afforded by the statute. As evidence, however, of that necessity it may be stated that since the passage of the act more than fourteen thousand suits have been brought under it. On a conservative estimate a million dollars has been expended by the property owners of San Francisco in availing themselves of its provisions, and on an equally conservative estimate the title to probably fifty thousand parcels of land has been thus established and made matter of public record. In most of these cases the proceedings have ripened into judgments. These judgments furnish the only record title now existing to any real estate in San Francisco. It would be difficult to over-estimate or over-state the consequences of a decision by this Court which would throw into uncertainty the validity of these judgments, thousands in number, and render irremediable the condition in which the owners of property in the chief city of the State were left by the fire—their titles dependent upon parol proof, deprived of public record and incapable of conclusive establishment.

There is no occasion to urge upon this Court the propriety or wisdom of the elementary rule that a statute should not be declared invalid unless its invalidity be established beyond question. Superadded to this consideration in the present case are the consequences which would flow from a declaration that judgments, thousands in number, the validity of which has been adjudicated by the highest tribunal of the State and which have been treated as conclusive evidence of title, are void.

C. The Provisions of the Statute Here Involved.

The main provisions of the act of June, 1906, may be briefly stated.

It provides that whenever the public records in the office of a county recorder are lost or destroyed by earthquake, fire or flood, any person who claims an estate of inheritance or for life, and who is by himself, or his tenant or other person, holding under him, in the actual and peaceable possession of any real property in such county, may bring and maintain an action "*in rem, against all the world*," in the superior court of the county where the land is situate, "to establish his title to such property and to determine all adverse claims thereto." The action is commenced by the filing of a verified complaint; the defendants being described as "all persons claiming any interest in or lien upon the real property herein described, or any part thereof." At the time of the filing of the complaint the plaintiff is required to file with the same his affidavit, fully and explicitly setting forth and showing (1) the character of his interest, the duration of its existence, and from whom

it was obtained; (2) whether or not he has ever made any conveyance affecting the property, and if so, when and to whom, and a statement of any and all subsisting mortgages, deeds of trust and other liens; (3) that he does not know and has never been informed of any other person who claims or may claim, any interest in or lien upon the property adversely to him. If he does know or has been informed of any such person, he is required to give the name and address of any such person. If unable to state any of these facts, the reasons for his inability must be set out in full. This affidavit is made to constitute a part of the judgment roll. By this provision it was intended to make the execution of a sufficient affidavit essential to a valid judgment (as is not the case in many statutes providing for suits against unknown owners; *Walker* vs. *Ogden*, 192 Ill., 314; 61 N. E., 403, nor in the case of the ordinary affidavit for publication of summons, which forms no part of the judgment roll. *Sichler* vs. *Look*, 93 Cal., 600; *People* vs. *Temple*, 103 Cal., 447.)

Upon the filing of the complaint, a summons is issued under the seal of the court, containing a "particular description" of the real property involved, giving the name of the plaintiff, and directed to "all persons claiming any interest in or lien upon the real property herein described, or any part thereof." The summons is required to be published in a newspaper of general circulation published in the county in which the action is brought, and designated by order of the court or judge, at least once a week, for a period of two months. If the affidavit already referred to disclose the name of any

person claiming any interest in or lien upon the property, that fact, together with the name and address of such person, is required to be stated in a memorandum appended to the summons and such memorandum must be published with it. Furthermore, a copy of the summons and of the memorandum are required to be posted in a conspicuous place on each separate parcel of the property described in the complaint within fifteen days after the first publication of summons.

In addition to the service of the summons by publication and by posting upon the property, it must be personally served upon every person who is disclosed in the affidavit as claiming any interest in or lien upon the property, provided such person can be found within the state. If a non-resident of the state, a copy of the summons, memorandum, complaint and affidavit is, within fifteen days after the first publication of the summons, required to be deposited in the post office, addressed to such person at the address given in the affidavit, or if the address be not known, at the county seat of the county in which the action is brought. If the person resides within the state and cannot with due diligence be found, summons is required to be served upon him by mailing in the same manner as against a non-resident.

In addition to the service of summons by publication, posting, personal service and mailing, the plaintiff is required, at the time of filing his complaint, to file a notice of *lis pendens* with the county recorder, containing a particular description of the property affected thereby, and the recorder is required to plat the same, with appropriate references, upon a map or plat, in a book kept by him

expressly for such purpose. The clerk is further required to keep a separate index of actions brought under the statute.

Upon the completion of the publication and posting of the summons and its service upon and mailing to the persons, if any, upon which it is directed to be so specially served,

> "the court shall have full and complete jurisdiction over the plaintiff and the said property and of the person of every one having or claiming any estate, right, title or interest, in or to, or lien upon, said property, or any part thereof, and shall be deemed to have obtained the possession and control of said property for the purposes of the action, and shall have full and complete jurisdiction to render the judgment therein which is provided for in this act."

Any party affected by the action is entitled to appear within three months, or within such further time, not exceeding thirty days, as the court may grant, and by verified answer set out his claim to the property. No judgment is permitted to be given by default, but the court must in every case require proof of the facts alleged. The judgment in the action, it is provided,

> "shall ascertain and determine all estates, rights, titles, interests and claims in and to said property and every part thereof, whether the same be legal or equitable, present or future, vested or contingent, or whether the same consist of mortgages or liens of any description, and shall be binding and conclusive upon every person who, at the time of the commencement of the action, had or claimed any estate, right, title, or interest in or to said property, or any part thereof, and upon every person claiming under him by title subsequent to the commencement of the action."

A certified copy of this judgment is required to be recorded in the office of the county recorder, and the entire judgment roll may be so recorded at the option of any party.

All the provisions and rules of law relating to evidence, pleading, practice, new trials and appeals applicable to other civil actions, are, except as otherwise provided, made applicable to the action under the statute.

The statute provides that where one judgment under it has been entered as to any real property, no other action relative to the same property shall be tried until proof is first made to the Court that all persons who appeared in the first action have been served with the papers in that action at least a month before the expiration of the time to plead. Finally, the act provides that its remedies

> "shall be deemed cumulative, and in addition to any other remedy now or hereafter provided by law for quieting or establishing title to real property."

D. Statement of the Contentions of Appellant.

In attacking the validity of the statute before the Courts of the State of California numerous provisions of the State Constitution were relied upon. The act was impeached not only upon the grounds here urged but as being local and special legislation, as being insufficiently described in its title, and as conferring non-judicial powers upon the Courts of the State in violation of the State Constitution. These questions have been foreclosed by the decision of the State Courts upholding the act as valid. But one question is here involved,

namely, whether the act does, as to unknown claimants, provide due process of law within the meaning of the fourteenth amendment.

In the brief submitted by counsel for appellant, various contentions are urged in support of the claim that the act does not afford due process of law to unknown claimants. The arrangement of the brief is, however, such that these independent propositions are not easily distinguishable. When analyzed, they are found to be four in number.

1. That the action prescribed by the statute is not an action *in rem* nor sustainable as such.

(a) Because the proceeding itself is not in the form of an action *in rem*, and

(b) Because a State has no power to authorize a proceeding *in rem* for the purpose of quieting title to real property.

2. That the case is not one in which constructive service of process is constitutionally permissible.

3. That no reasonable notice can be afforded unknown claimants, since the process "does not describe the person to be cited."

4. That the proceeding prescribed by the statute is not judicial in character but a mere "declaration of right" upon an "*ex parte* application."

E. Statement of the Propositions Considered in This Brief in Support of the Validity of the Act.

These contentions (above enumerated) are fully discussed and answered in the three opinions rendered by

the Supreme Court of California, to which reference has already been made.

Title & Document Restoration Company vs. *Kerrigan,* 150 Cal., 289; 88 Pac., 356; 119 Am. St. Rep., 199; 8 L. R. A. (N. S.), 682;

Robinson vs. *Kerrigan,* 151 Cal., 40; 90 Pac., 129; 121 Am. St. Rep., 90;

Hoffman vs. *Superior Court,* 151 Cal., 386; 90 Pac., 939.

For reasons already stated, it has been deemed proper to present to this Court somewhat more fully than was possible within the limits of those opinions, the considerations which dispose of appellant's contentions and the authorities which show that the process afforded by the statute as against unknown claimants is unquestionably due process of law.

We shall in this brief endeavor to establish the following propositions:

I. That the State is sovereign over lands lying within its boundaries by whatever persons owned, and may make an adjudication as to the title of such lands, binding and conclusive upon all persons.

II. That due process of law within the meaning of the federal constitution requires no particular form of procedure; its essentials are matters of substance rather than of form, and any proceeding affords due process of law which, being reasonably suited to the nature of the case, gives reasonable notice to the parties affected and affords fair opportunity for defense.

III. That it is within the power of the Legislature to provide for a proceeding strictly *in rem* in order to quiet the title to real property within the limits of the State.

IV. That the proceeding prescribed by the statute under discussion is a proceeding strictly *in rem*.

V. That whether or not the proceeding authorized by the statute is one strictly *in rem* or substantially *in rem*, is immaterial. In both jurisdiction rests upon the same basis and the decrees in both have the same potency as to the *res*.

VI. That proceedings to bar the rights of unknown owners are constitutional, and that the rights of such claimants may be foreclosed in proceedings either strictly *in rem* or substantially *in rem*.

VII. That the notice to unknown claimants provided by the statute under discussion is reasonable and constitutes due process of law.

VIII. That the proceeding prescribed by the statute is a judicial one and in no sense *ex parte*.

II.

THE STATE IS SOVEREIGN OVER LAND LYING WITHIN ITS BOUNDARIES BY WHATEVER PERSONS OWNED, AND MAY MAKE AN ADJUDICATION AS TO THE TITLE TO SUCH LAND BINDING AND CONCLUSIVE UPON ALL PERSONS.

At the very basis of appellant's position is the contention that a State is powerless by any proceeding or by any notice to settle the title to land within its limits and

to constitutionally affirm title to such land in one person and adjudicate that title as against the world. On page 115 of their brief they "deny that any notice, *however reasonable* in other respects, can internationally or otherwise speaking give a Court jurisdiction to conclude persons resident or non-resident against whom nothing is alleged and who are not even named or served."

Dismissing for the moment the casuistry which described as persons "against whom nothing is alleged and who are not even named or served" unknown claimants, who are sued by general designation in an action to establish and quiet title, and who are served with process in every form of constructive service known to the law, this statement is a practical denial of the right of a State to adjudicate the title to land within its limits as against undisclosed or unknown claims.

It will be noted, therefore, that the position of appellant is in the main based not upon any defect in particular provisions of the statute, but upon the general proposition that its purpose is impossible of constitutional accomplishment. The brief of counsel for appellant assumes, and indeed argues, that a State is powerless to prescribe any judicial proceeding in which it can determine the title to property within its boundaries as against the world.

To such a contention the statutes which exist in practically every State of the Union and which have existed in many of them for nearly a century, authorizing suits against unknown owners, the authorities (so numerous that even a citation of them becomes impracticable) which hold that proceedings against unknown owners in suits to

quiet title and in similar forms of action are valid and constitutional, the "Burnt Records Act" of Illinois and the numerous cases upholding its validity, and the Torrens acts of different states the constitutionality of which has been repeatedly vindicated, are sufficient answer. It is proper, however, at this point to briefly review a few of the authorities in which the suggestion of such impotence in a State has been repudiated and a declaration made of its undoubted right and equally undoubted duty to settle and make certain the title to lands within its borders.

The argument here urged by appellant is practically the same as that which for years, and until the law became otherwise settled, was urged against the right of a State to adjudicate the title to real property within its limits as against non-resident defendants notified only by constructive service of process. It is true that appellant in this case concedes the validity of such service. This was, of course, a necessary concession in view of the innumerable authorities establishing its propriety. The basis of such proceedings is, however, the principle that a State is sovereign over the lands within its borders with the undoubted power, in the language of *Hamilton* vs. *Brown*, 161 U. S., 256,

> "to provide for determining and quieting the title to real estate within the limits of the State and within the jurisdiction of the Court *after actual notice to all known claimants and notice by publication to all other persons.*"

In *Arndt* vs. *Griggs*, 134 U. S., 316; 10 Sup. Ct. Rep., 557, answering a contention that a state had no power

to bring a non-resident into its courts by publication of process in order to quiet title to lands within its jurisdiction, Mr. Justice Brewer said:

> "If a state has no power to bring a non-resident into its courts for any purposes by publication, it is impotent to perfect the titles of real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a non-resident will remain for all time a cloud, unless such non-resident shall voluntarily come into its courts for the purpose of having it adjudicated. *But no such imperfections attend the sovereignty of the state. It has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subject to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto.* It cannot bring the person of a non-resident within its limits, its process goes not out beyond its border,—*but it may determine the extent of his title to real estate within its limits; and, for the purpose of such determination, may provide any reasonable methods of imparting notice.* The well-being of every community requires that the title to real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. *The duty of accomplishing this is local in its nature. It is not a matter of national concern, or vested in the general government. It remains with the state; and, as this duty is one of the state, the manner of discharging it must be determined by the state, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the constitution, or against natural justice.*"

Replying to a similar suggestion in *Harris* vs. *Palmore*, 74 Georgia, 273, it was well said that such a doctrine would

"strike at the foundation of her sovereignty over her own domain, and sap the foundation of her peace and prosperity. It would undermine her sovereignty over her lands, because other states or countries would determine to whom they belonged, and it would be ruinous to her peaceful occupation of her own landed estates by those entitled to it, by having no power to settle the title, and to her prosperity, because nothing is so necessary to that as the unmolested and quiet possession of the land out of which grows all her wealth of food and clothing and comfort. In the last analysis, it is the soil of the state, cultivated by the unshackled and assured proprietors of that soil, in quiet and without threat of interruption of its use, which makes its prosperity.

"If this court had ever held any principle antagonistic to this overwhelming conviction of her power over her own territory, and her right, through her own courts, to exercise judicially that power, a full bench should review and reverse such a principle."

As is said by Mr. Justice Paterson, in *Perkins* vs. *Wakeham,* 86 Cal., 580; 21 Am. St. Rep., 67:

"If it be true that a state has no power by statute to provide for the determination of adverse claims to real estate lying within its limits, as against non-resident claimants, who can be brought into court only by publication,—if the state in her sovereignty is impotent to protect the title of citizens to her soil against the asserted claims of non-residents who will not voluntarily submit their claims to her courts for adjudication—great evil must result. Certainty and security in the titles of real estate, and convenient and effective procedure for the determination of individual rights in such property are essential to the prosperity of the community. If those who cannot be reached by the process of the courts may assert adverse claims to real estate and hold unlawful clouds over the title of the owner, every

homestead and lot in the state may have a cloud cast upon it for all time.

"We do not think that a sovereign state is so limited in its power. The state is paramount in power over all things real within its territorial boundaries, except so far as its authority is limited by the constitution and laws of the United States; and the courts of the state, acting within that limitation, have, and may, exercise all the jurisdiction over all persons and things which the constitution and laws of the state confer upon them. The manner of obtaining such jurisdiction, and the procedure for its exercise, are matters of state legislation."

In *Bennett* vs. *Fenton*, 41 Fed., 283; 10 L. R. A., 500, where it was contended that a decree quieting title could not be made to constitutionally operate as against persons not within the territorial jurisdiction of the court, Mr. Justice Shiras, after disposing of this contention, remarked:

"Unless it be held that the state can, by proper enactment, provide for a proceeding against the property to quiet the title, and in case of non-residents provide for service by publication or its equivalent, then it is practically put beyond the power of the state to secure to its citizens the means by which their right and title to realty may be settled."

Nor is the principle that a state is sovereign over land within its limits and has power to provide for the determination of title thereto, confined to a determination of the rights of *non-residents*. The same principles applied by the courts in the cases above cited are, as Mr. Justice Sloss points out in *Title & Document Restoration Company* vs. *Kerrigan*, of equal force in vindicating

the right of a legislature to bind unknown claimants where the notice is reasonably full and complete.

> "The validity of such judgments against known residents is based upon the ground that the state has power to provide for the determination of titles to real estate within its borders and that against non-resident defendants or others who cannot be served in the state, a substituted service is permissible as being the only service possible. These grounds apply with equal force to unknown claimants. The power of the state as to titles should not be limited to settling them as against persons named. In order to exercise this power to its fullest extent it is necessary that it should be made to operate on all interests, known and unknown."

In *Tyler* vs. *Judges of the Court of Registration,* 175 Mass., 71; 55 N. E., 812; 51 L. R. A., 433, Mr. Justice Holmes said, speaking of the statute of Massachusetts there upheld

> "If it does not satisfy the Constitution, a judicial proceeding to clear titles against all the world hardly is possible, for the very meaning of such a proceeding is to get rid of unknown as well as known claims —indeed certainty against the unknown may be said to be its chief end—and unknown claimants cannot be dealt with by personal service upon the claimant."

In *State ex rel. Douglass* vs. *Westfall,* 85 Minn., 437; 89 N. W., 175, in an opinion affirming the validity of such a statute, the Supreme Court of Minnesota, speaking through its Chief Justice, said:

> "To hold otherwise would be to hold that the courts of this state cannot in any manner acquire jurisdiction to clear and quiet the title to real estate by a decree binding all interests and all persons or

parties, *known or unknown,* for the provisions of this act are as full and complete as to giving notice to all interested parties as it is reasonably possible to make them. *That the courts of this state have jurisdiction to so clear and quiet title by their decrees is no longer an open question in this state. Shepherd* vs. *Ware,* 46 Minn., 174; 48 N. W., 773; 24 Am. St. Rep., 212; *Inglee* vs. *Welles,* 53 Minn., 197; 55 N. W., 117; *McClymond* vs. *Noble* (Minn.), 87 N. W., 838. See, also, *Mayall* vs. *Mayall,* 63 Minn., 511; 65 N. W., 942, and *Mathews* vs. *Lightner* (Minn.), 88 N. W., 992."

The cases in which the power of a state to determine conclusively as against all persons, resident or non-resident, known or unknown, title to the property within its boundaries, are so numerous, and the principle is so well settled, that a multiplication of quotations could serve no useful purpose. Many of them are hereinafter considered. See, however, in this general connection

Quarl vs. *Abbett,* 102 Ind., 233; 52 Am. Rep., 662;

Mason vs. *Messenger,* 17 Ia., 261;

Venable vs. *Dutch,* 37 Kan., 515; 15 Pac., 520; 1 Am. St. Rep., 262;

Dillon vs. *Heller,* 39 Kan., 599; 18 Pac., 693;

Covington, etc., R. R. Co. vs. *Bowles,* 9 Bush, 468;

Loring vs. *Hildreth,* 170 Mass., 328; 49 N. E., 652;

Tyler vs. *Judges of Registration Court,* 175 Mass., 71; 55 N. E., 812; 51 L. R. A., 433;

Ormsby vs. *Ottman,* 85 Fed., 492;

U. S. vs. *Fox,* 94 U. S., 315;

Penoyer vs. *Neff,* 95 U. S., 714.

These cases not only establish that a State being sovereign within its borders, has the power to provide for

the conclusive settlement of the title to property located within it, but they stand further as a vindication, if any vindication were needed, of the wisdom and propriety for statutes such as that here attacked.

> "The well being of every community requires that the title to real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it."
>
> *Arndt* vs. *Griggs*, 134 U. S., 316.

Statutes to quiet title, to remove clouds from titles and to settle adverse claims, bills *quia timet* and analogous proceedings are recognitions of a necessity which has always existed and has been recognized in the statutes of nearly every state in the Union, and probably of almost every civilized country in the world. If there be such necessity under normal conditions, that necessity becomes increased a thousandfold when landmarks, muniments of title and public records, upon which the security of titles havedepended since the institutionof private ownership, are obliterated by conflagration, and the evidences upon which men have relied for the protection of their rights are destroyed by a catastrophe such as that which compelled the passage of this statute. If, with systems of registration intact, monuments marking the boundaries of land undisturbed, documents and muniments of title untouched and in the hands of proper owners, it is competent and proper for a legislature to provide for the determination of adverse claims against real property and the establishment of conclusive titles, its competence is equally undoubted, the *propriety* of such action ceases to be a question and it be-

comes a matter of *necessity* where all public records have been destroyed, all landmarks annihilated and practically all muniments of title wiped out of existence.

III.

"DUE PROCESS OF LAW," WITHIN THE MEANING OF THE FEDERAL CONSTITUTION, REQUIRES NO PARTICULAR FORM OF PROCEDURE. ITS ESSENTIALS ARE MATTERS OF SUBSTANCE RATHER THAN OF FORM. ANY PROCEEDING AFFORDS DUE PROCESS OF LAW WHICH, BEING REASONABLY SUITED TO THE NATURE OF THE CASE, GIVES REASONABLE NOTICE TO THE PARTIES AFFECTED AND AFFORDS FAIR OPPORTUNITY FOR DEFENSE.

With the right of a state in the exercise of its sovereignty to provide for the settlement of title to land within its boundaries and the propriety and wisdom of such legislation in general established, we are brought to a consideration of the objection that the act here under discussion does not provide "due process of law" to those sued as unknown claimants.

A. The Meaning and Essentials of "Due Process of Law" in General.

A very large portion of the brief of appellant is devoted to an attempt to establish a lack of historical precedent for the remedy afforded by the statute under consideration and the procedure which it prescribes. Such, as we shall hereafter show, is far from being the case. The statute is not only practically identical with

numerous statutory provisions, the validity of which has been repeatedly sustained, but prescribes a procedure justified by and strictly analogous to proceedings at law and in equity long antedating in their origin the adoption of the Federal Constitution or of the Fourteenth Amendment.

It would, however, be no impeachment of the statute, and no proof that it fails to afford due process of law were historical analogies entirely lacking.

The Federal Constitution and its Amendments are framed in general terms:

> "The Constitution unavoidably deals in general language. * * * The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter, and restrictions and specifications which at the present might seem salutary might in the end prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature from time to time to adopt its own means to effectuate legitimate objects and to mold and model the exercise of its powers as its own wisdom and the public interests should require."

Mr. Justice Story, in *Martin* vs. *Hunter*, 1 Wheat., 326.

For equally obvious reasons the language of the Fourteenth Amendment is general. It makes no attempt to prescribe forms of procedure or to bind the legislatures of the states to the employment of such remedies only as were employed at the time of its adoption. That a par-

ticular proceeding is "due process of law" may in many cases be shown by proof that it was in use at the time of the adoption of the Constitution, and of a then recognized validity. On the other hand, the mere fact that a procedure is novel does not show it to be unconstitutional.

Such a test

> "would be to deny every quality of law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians."
>
> *Hurtado* vs. *California*, 110 U. S., 516.

"A perfectly satisfactory definition of due process of law may perhaps not be easily stated," says Mr. Justice Brewer in *Brown* vs. *New Jersey*, 175 U. S., 172, 176; and in *Orient Insurance Company* vs. *Daggs*, 172 U. S., 557, Mr. Justice McKenna observes that this phrase "is not much nearer to precise definition today than it was said to be by Justice Miller in *Davidson* vs. *New Orleans*, 96 U. S., 97."

Courts have, in ascertaining its intent and application, proceeded always by the "gradual process of inclusion and exclusion," but have never found

> "it possible to hold that a party has without due process of law been deprived of his property, when as regards the issues affecting it, he has by the laws of the State a fair trial in a court of justice according to the modes of proceeding applicable in such case."
>
> *Davidson* vs. *New Orleans*, 96 U. S., 97.

This prohibition of the Constitution is to be taken "with a regard to substance rather than to form."

Tyler vs. *Judges of Court Registration,* 175 Mass., 71; 55 N. E., 812; 51 L. R. A., 433;
Harlan, J., in *Chicago etc. R. R. Co.* vs. *Chicago,* 166 U. S., 235;
Hurtado vs. *California,* 110 U. S., 516.

The Fourteenth Amendment, it is well settled, does not guarantee any "particular forms of procedure," but rather the *substance* of the individual rights to life, liberty and property.

Hurtado vs. *California,* 110 U. S., 516;
Kennard vs. *Louisiana,* 92 U. S., 480.

The novelty of a procedure is no objection to it.

Hurtado vs. *California,* 110 U. S., 516;
Tyler vs. *Court of Registration,* 175 Mass., 71; 55 N. E., 812; 51 L. R. A., 433.

"It is a mistake to suppose that 'due process of law' is found only in law or chancery actions. Special proceedings, applicable to specified subject-matter, and conformable to the rules requiring notice and the acquisition of jurisdiction, and which affect all persons alike, whose property or rights come within the lawful scope of the proceedings, are prosecuted with 'due process of law.' "

Burlington etc. R. R. Co. vs. *Dey,* 82 Ia., 312; 48 N. W., 98; 31 Am. St. Rep., 477.

The Legislature has thus the power, without violating

the "due process of law" clause of the Constitution, to alter remedies from time to time.

People vs. *Essex Co.*, 70 N. Y., 228;
Hurtado vs. *California*, 110 U. S., 516;
Taylor vs. *Beckham*, 178 U. S., 548;

and in so doing that procedure is held to constitute due process of law which is *reasonably suitable to the nature of the case.*

Kennard vs. *Louisiana*, 92 U. S., 480;
Hagar vs. *Reclamation District*, 111 U. S., 701;
Ex parte Wall, 107 U. S., 265, 289.

> "Any legal proceeding enforced by public authority, whether sanctioned by age and custom, *or newly devised in the discretion of the legislative power* in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law."

Mr. Justice Matthews, in

Hurtado vs. *California*, 110 U. S., 516.

These principles are of course general and elementary and are here stated merely as preliminary to a more particular discussion of the points involved on this appeal. They are, however, apposite to that discussion in so far that they show that the question whether a particular proceeding amounts to "due process of law" is not to be determined by a consideration of its novelty. They furnish an answer to a large portion of appellant's brief and amply justify the language of Mr. Justice Sloss in *Title and Document Restoration Co.* vs. *Kerrigan*:

"No doubt the forms of procedure in common use at the time the constitutions were adopted must be taken to have been understood by the framers as embraced within the term 'due process of law,' but in prohibiting the taking of life, liberty or property without due process of law, those who adopted these constitutions did not intend to provide that the details of practice and procedure then existing should remain forever unchanged. The legislature may provide entirely novel and unprecedented methods of procedure, provided that they afford the parties affected the substantial securities against arbitrary and unjust spoliation, which are embraced within the system of jurisprudence prevailing throughout the land (quoting *Hurtado* vs. *California*, 110 U. S., 516). It is not, therefore, a sufficient objection to the action created by this statute to say that no precisely similar proceeding was known to the common law."

B. The Failure of a Party in a Particular Case to Receive Actual Notice Where Constructive Notice to Him is Constitutionally Permissible, Cannot Affect the Validity of Such Constructive Notice as Affording Due Process of Law.

"The essential elements in due process of law are notice and opportunity to defend."

Simon vs. *Craft*, 182 U. S., 427.

See to the same effect,

Louisville etc. R. R. Co. vs. *Schmidt*, 177 U. S. 230.

That the requirement of notice does not necessarily imply actual notice, is established by the authorities already cited and those hereinafter reviewed. Indeed, practically all of the cases in which the sufficiency of notice has been before the Supreme Court of the United

States, are cases in which the notice was constructive and failed in the particular case to give actual notice.

In the case at bar it is claimed that two persons who were residents of San Francisco during the proceedings which terminated in the judgment here attacked and who claimed an interest in the property affected by those proceedings had no actual notice thereof.

It is conceded that this was due to no fraud upon the part of the plaintiff in those proceedings, and that it must be assumed that the claims of both of these persons to any interest in the property involved were in fact unknown to him. It is admitted that constructive notice was given in every form which the statute requires, and, as we shall hereafter show, the statute requires practically every form of constructive notice known to our system of jurisprudence. A copy of the summons was posted upon the land itself. A notice of *lis pendens* was filed in the County Recorder's office, giving notice to all persons concerned that the proceedings were pending and describing the land involved. Upon public maps devoted exclusively to that purpose, the property affected by the action was platted and reference made to the recorded notice of its pendency. The summons containing a description of the property was published in a newspaper of general circulation at least once a week for a period of two months, as required by the statute.

It is not intended to discuss at this point the validity of constructive service nor the undoubted power of a state to provide for such service of process upon unknown owners. The validity of proceedings such as that prescribed by the statute will, we think, be hereinafter fully

demonstrated and the sufficiency of the notice prescribed by it established by authorities practically innumerable.

It is obvious, however, that where constructive service is permissible, it is immaterial in a constitutional sense whether in a particular case *actual* notice resulted. It is, of course, unfortunate that anyone should be deprived of property or even of a claim thereto without actual notice of proceedings intended to affect such claim. In every case, however, where constructive notice is permissible there is a possibility that actual notice may not reach all persons interested.

In re Empire City Bank, 18 N. Y., 199, speaking of the right of a legislature to prescribe constructive notice, Denio, J., says:

> "Various prudential regulations are made with respect to these remedies, but it may possibly happen that notwithstanding all these precautions that a citizen who owes nothing and has done none of the acts mentioned in the statutes, may be deprived of his estate without any actual knowledge of the process by which it has been taken from him. If we hold, as we must, in order to sustain this legislation, that the constitution does not positively require personal notice in order to constitute a legal proceeding due process of law, it then belongs to the legislature to determine in the particular instance whether the case calls for this kind of exceptional legislation and what manner of constructive notice shall be sufficient to reasonably apprise the party proceeded against of the legal steps which are taken against him."

If, in any ordinary case, constructive notice is justified and may be relied upon as insuring at least a probability of actual notice to those whose interests are to be affected,

the circumstances under which the Act of June, 1906, was passed rendered actual notice of proceedings affecting their rights well-nigh certain to all who, claiming rights in property in San Francisco, used the slightest diligence in the preservation of those rights or paid the slightest attention to them. It would be difficult to frame language more appropriate to the present case than that used by the Supreme Court of Illinois in *Bertrand* vs. *Taylor*, 87 Ill., 235, in affirming the constitutionality of the "Burnt Records Act."

> *"It was demanded as a matter of safety in a great emergency. It was not calculated to take any reasonable being by surprise. It was known throughout the civilized world that a large part of the city of Chicago had been destroyed by fire and that the records of courts and the records of deeds were all destroyed. This naturally commanded the attention of all reasonable persons everywhere and called upon them to attend and see what means would be adopted to mitigate the evils and dangers incident to the destruction. This legislation was not done in a corner, but before the observation of the civilized world. We cannot doubt the power of the general assembly to pass the act."*

Without at this point entering into any extended discussion of the provisions of the statute, a brief review of the precautions taken by it to insure actual notice to all persons will show how complete must be the self-effacement of one who, claiming rights in property, would receive no notice of proceedings pending with respect to it. At the outset the statute provides that no one not in the actual and peaceable possession of the property can maintain the action. No person could therefore

be deprived of his property under the statute unless he had not only gone out of possession of it, and allowed another to acquire actual and peaceable possession, but had left his claim undisclosed to the possessor and had thus rendered it possible for the latter to make oath that neither the other's claim, his name, nor his address was known. (This under all of the cases construing acts against unknown owners means "or can be known with reasonably diligent inquiry." *Dewey* vs. *Kimball*, 89 Minn., 454; 95 N. W., 317, 895; *Leigh* vs. *Green* (Neb.), 90 N. W., 254; see also *Title, etc. Restoration Co.* vs. *Kerrigan*, 150 Cal., 289, and *Hoffman* vs. *Superior Court*, 151 Cal., 391, the latter holding merely that the inquiry need not be shown *in the affidavit*.)

In addition to this, a party must fail to receive notice where every usual means of constructive service of process known to the law is employed to give him notice.

As said by the Supreme Court of the United States in

Underwood vs. *Dugan*, 139 U. S., 380, 384; 11 Sup. Ct. Rep., 618:

> "Ownership of property implies two things: *First, attention to it;* and second, a discharge of all obligations of taxation, or otherwise, to the state which protects it."

If, however, in some isolated instance, some claimant of property, in spite of all that is done in the statute to give him notice, has so completely effaced himself that even those provisions fail of their intended effect, it is a case where rare individual hardship must yield to an urgent and important public need.

> "All human institutions are imperfect, courts as well as commissions and legislatures."
>
> Bradley, J., in *Chicago, etc., Ry. Co.* vs. *Minnesota*, 134 U. S., 465.

> "The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition and of the vicissitudes to which they are subject. This is the foundation of all judicial proceedings *in rem.*"
>
> *Broderick's Will*, 21 Wall., 519.

The same trite view is expressed by Mr. Justice Miller in *Huling* vs. *Kaw Val. Ry., etc.*, 130 U. S., 559; 9 Sup. Ct. Rep., 603, where, speaking of the validity of constructive notice against a non-resident, he says:

> "It is the duty of the owner of real estate, who is a non-resident, to take measures that in some way he shall be represented when his property is called into requisition, and if he fails to do this and fails to get notice by the ordinary publications which have usually been required in such cases, it is his misfortune, and he must abide the consequences."

We shall have occasion hereafter to consider somewhat fully the suggestions of counsel as to supposed imperfections of the statute. Such suggestions, however proper, when addressed to a legislature, are entirely beside any question presented in this case. If the statute provides a proceeding which the legislature is competent to authorize and such notice as answers the requirements of due process of law, the statute is constitutional and the judgment here attacked is valid and conclusive. Nor can any hardship, real or supposed, presented in a particular case and arising from the fact that despite all

precautions a party has failed to receive actual notice affect the validity of the statute or the sufficiency of the process it affords.

It is perhaps germane to no question involved in the case at bar, but it is nevertheless worthy of note, that even the *possibility* of actual notice of proceedings under the act failing to reach those who, by the exercise of the slightest diligence, desire to preserve any claims they may have to property in San Francisco, has been avoided by an act supplementary to that under discussion and approved March 23, 1907 (Stats. Cal., 1907, p. 950). All that is necessary under the supplementary act to *insure personal service* of process in any proceeding under the act of June, 1906, is that the claimant of an interest in property file for record in the office of the county recorder a verified notice of his ownership and claim.

> "Any person who, from and after three days after the date of the filing of such notice for record, shall begin any action relating to the real property described in such notice to perfect or establish his title thereto, or to any part thereof, or any interest therein, * * * must name the claimant in such notice,"

or any successor in interest under a recorded instrument, in the affidavit and summons, make personal service upon him in the manner provided for service upon other known claimants,

> "otherwise neither the said action nor any judgment or decree which may be given or made therein shall in anywise affect the title or interest in the property described in such notice, owned by the claimant named therein at the time of the filing thereof, or by any successor in interest of such claimant" under a subsequently recorded instrument.

IV.

IT IS WITHIN THE POWER OF A STATE TO PROVIDE A PROCEEDING STRICTLY IN REM TO ESTABLISH AND QUIET TITLE TO REAL PROPERTY WITHIN ITS LIMITS.

On pages 91 *et seq.* of the brief of counsel for appellant is discussed the proposition that "the action provided for by the act is not an action *in rem.*" It is, we think, conceded by counsel here, as it was in the State Supreme Court, that if the legislature may prescribe a proceeding *in rem* to try title, the objections to the present act are without force. They contend, however, that a legislature is without power to provide a proceeding *in rem*—strictly *in rem*—for the purpose of trying title to real property.

Whether or not the proceeding prescribed by the statute is one "strictly *in rem*," it is admittedly one "substantially *in rem*," and in a proceeding of the latter class it is the law, settled by innumerable authorities, that a state may adjudicate the title to property within its boundaries after actual notice to known claimants and constructive notice to all other persons. This is, of course, decisive of the validity of the act. We submit, however, that the legislature of a state *has* power to provide for the determination of title to real property within its borders in an action strictly *in rem*, and that the proceeding provided by the act here involved is one which the statute accurately describes as "*an action in rem* against all the world."

The relative importance (or rather the lack of importance) of this question in the case at bar, and the nature of the question itself may best be shown by briefly stating the distinction between the class of cases recognized by counsel as actions strictly *in rem* and those substantially *in rem.* We shall not pause to discuss whether proceedings *in rem,* properly speaking, are limited to the class which counsel for appellant recognize as such, or whether, on the other hand, a proceeding whatever its form, which is intended to bind all persons, is not as Mr. Justice Holmes suggests (in *Tyler* vs. *Judges, supra*), necessarily "a proceeding *in rem.*"

We assume, therefore, for the purposes of immediate discussion, that a proceeding strictly *in rem* is one wherein the jurisdiction of the court is made to depend upon its power over the *res,* in which (ordinarily) the *res* is named as defendant, in which jurisdiction is acquired by seizure of the *res* and in which such seizure, with such other constructive notice as is prescribed, confers upon the court the power to determine such questions respecting the *res* as are involved in the proceeding.

In actions of the class described as *substantially in rem,* the action is in form between named or designated parties, impleaded as such. The jurisdiction of the court depends, however, upon its possession of and control over a *res,* and is exercised after such reasonable notice to the parties as the law may prescribe. The decree operates directly upon the *res,* but binds the rights therein of only such persons as have been impleaded as parties and have been afforded notice, actual or constructive, of the proceedings.

In the first class of actions (those *strictly in rem*) the suit is one in form against the *res* and impleads those who have interests therein by seizure of or service of process upon the *res*. In the second class of proceedings the action is one against the persons who are made defendants, but the power of the court is limited to a *res* within its territorial jurisdiction. In proceedings of the first class the action is *always* against the whole world, operating as it does against the *res* itself, and thereby impleading all persons interested. In proceedings of the second class the action may be against a few named persons or may, by enlarging the class of defendants to include all persons interested, and by reasonable notice addressed to them and served in legal manner, be made operative against the world.

The statute here under consideration provides for service of process not only upon the *res*, but as well upon all persons claiming any interest therein. The property to be affected is admittedly within the territorial jurisdiction and subject to the control of the court. The decree operates upon the *res* itself. Actual personal service upon every known defendant is prescribed and constructive service in every manner known to the law is made upon all other parties to the action. It is obvious, therefore, that a determination of the validity of the act does not rest upon the question whether it is proper treated as a proceeding strictly *in rem*. If the notice prescribed by it to unknown owners be reasonable and sufficient under the authorities to constitute due process of law, it is, whatever its form, not in violation of the Fourteenth Amendment. If, on the other hand, the

state has power to provide a proceeding strictly *in rem* to quiet title to property within its limits, and the proceeding under the statute here attacked is a proceeding of that class, its validity is concededly established.

The first question presented, therefore, is whether the legislature may provide a proceeding "strictly" *in rem* to try the title to real property. Has it the *power?*

To this the most conclusive answer is a question. If not—why not? What is the constitutional provision which forbids it? What clause of the Federal Constitution thus deprives a state of the right to prescribe the mode of judicial procedure in its courts?

Counsel for appellant urge the claim that historically a proceeding strictly *in rem* to try the title to property was unknown and that such a proceeding is permissible only where (to use the language of Loring, J., dissenting in *Tyler* vs. *Judges of the Court of Registration*, 175 Mass., 71; 55 N. E., 812; 51 L. R. A., 433) the action is "to enforce a liability for which the *res* is liable irrespective of who owns it; such a liability that the *res* can properly be impleaded as the respondent who is liable."

The Supreme Court of this state, following in this respect the majority of the court in the Massachusetts case just cited, held very properly that it was unnecessary in order to uphold the statute to "determine whether or not the action is one strictly *in rem.*" But after pointing out that numerous proceedings admittedly *in rem*, such, for instance, as proceedings in probate, have been employed from time out of mind in cases where no liability *against the res* was involved, and where the only

purpose was to settle the rights of persons with respect to the *res,* Mr. Justice Sloss pointedly observed:

> "Even though viewed as a matter of historical analogy, there may have been at common law no proceeding *in rem* which was at all similar to the one here provided, it may be asked why the state in exercising its control over the ascertainment and settlement of title to real estate within its borders, may not create a suit *in rem* in which the court assumes control of the land and which has as its primary purpose the settlement of such titles as to all the world."

Authorities have already been cited and might easily be multiplied, to the point that "due process of law" does not depend upon mere forms of procedure nor upon the age of a particular remedy.

Hurtado vs. *California,* 110 U. S., 516.

In *Holden* vs. *Hardy,* 169 U. S., 366, Mr. Justice Brown, delivering the opinion of the court, reviews at length the decisions in which striking innovations in procedure have been held to afford due process of law. These cases he says

> "will demonstrate that, in passing upon the validity of state legislation under that amendment, this court has not failed to recognize the fact that the law is to a certain extent a progressive science; that in some of the states methods of procedure which at the time that the constitution was adopted were deemed essential to the protection and safety of the people or to the liberty of the citizen, have been found to be no longer necessary."

Speaking of fundamental changes in the law which had

been made prior to the adoption of the constitution, the learned justice continues:

> "The present century has originated legal reforms of no less importance. * * * They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future and that while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation and that the constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the states of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land.
>
> "Of course it is impossible to forecast the character or extent of these changes, but in view of the fact that from the day Magna Charta was signed to the present moment, amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue and the law be forced to adapt itself to new conditions of society."

In the course of the opinion it is pointed out that it would be entirely permissible for a state, without any violation of the Fourteenth Amendment, to adopt a system of jurisprudence entirely foreign to the common law and to prescribe, for instance, as its rule of decision and its system of judicial procedure, that of the civil law. As said by Mr. Justice Bradley in *Missouri* vs. *Lewis*, 101 U. S., 22, 31:

> "We might go still further and say with undoubted truth that there is nothing in the constitution to pre-

vent any state from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the common law and its methods of procedure for the rest of the state, there is nothing in the constitution of the United States to prevent its doing so."

At the risk of repetition, we again quote from *Arndt* vs. *Griggs*, 134 U. S., 316. After declaring that "no such imperfections attend the sovereignty of the state" as to prevent it from providing for the conclusive settlement of the title to land within its boundaries, the Supreme Court said:

> "It has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability, to obligations, private or public, *and the modes of establishing titles thereto.* It cannot bring the person of a non-resident within its limits, its process goes not out beyond its borders—but it may determine the extent of his title to real estate within its limits; and, for the purpose of such determination, *may provide any reasonable methods of imparting notice.* The well-being of every community requires that the title to real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. *The duty of accomplishing this is local in its nature. It is not a matter of national concern, or vested in the general government. It remains with the state; and, as this duty is one of the state, the manner of discharging it must be determined by the state, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the constitution, or against natural justice.*"

On principle, the power of a state to prescribe a proceeding *in rem* to quiet title to real property within its boundaries seems unquestionable, and is, we submit, fully established in the opinion of Mr. Justice Holmes in *Tyler* vs. *Judges of Registration*, 175 Mass., 71; 55 N. E., 812. The analogies in numerous proceedings such as proceedings in probate, proceedings *in rem* for the confirmation of tax titles, the determination of escheats, the condemnation of land, etc., are at once suggested. We shall hereafter consider in other connections the grounds upon which counsel attempt to distinguish and explain these various actions strictly *in rem*, as being consistent with the view that a state is without power to prescribe such proceedings to establish title to land.

What now is the basis of the contention that the legislature is powerless to provide a proceeding *in rem* to quiet title? The contention of counsel for appellant is practically that made in the dissenting opinion of Mr. Justice Loring in *Tyler* vs. *Judges of the Court of Registration*, 175 Mass., 71; 55 N. E., 812; 51 L. R. A., 433;—that there can be a proceeding strictly *in rem* only where

> "it is to enforce a liability for which the *res* is liable, irrespective of who owns it,—such a liability that the *res* can be properly impleaded as the respondent who is liable * * * If it is not such a proceeding, and is a proceeding to enforce an ordinary right of lien or of property only, the proceeding is not in its nature a proceeding *in rem*, and the legislature cannot make it so by providing that all the world shall be barred."

Paraphrased, the proposition is that the legislature cannot establish a proceeding *in rem*,

"except where the thing itself is liable, irrespective of who owns it—such a liability that the *res* can be properly impleaded as the respondent who is liable."

To this argument, which elevates a fiction to the dignity of a constitutional principle, Mr. Justice Holmes returns a conclusive answer.

"All proceedings, like all rights, are really against persons; whether they are proceedings or rights *in rem* depends upon the number of persons affected. Hence the *res* need not be personified and made a party defendant as happens with a ship in admiralty. It need not even be a tangible thing at all, as sufficiently appears in the case of the probate of wills. *Personification and naming the res as defendant are mere symbols, not the essential matter. They are fictions, conveniently expressing the nature of the process and the result; nothing more.*"

Referring to the case ordinarily cited as typical of an action strictly *in rem*—that of libel in admiralty, Mr. Justice Holmes observes,

"But a ship is not a person, it cannot do a wrong, or make a contract. To say that a ship has committed a tort is merely a shorthand way of saying that you have decided to deal with it as if it had committed one, because some man has committed one in fact. There is no *a priori* reason why any other claim should not be enforced in the same manner. If a claim for a wrong committed by a master may be enforced against all interests in the vessel, there is no juridical objection to a claim of title being enforced in the same manner. The fact that it is not so enforced in existing practice affords no test of the powers of the Legislature. The contrary view would indicate that you really believed the fiction that the vessel had an independent personality as a fact behind the law."

In *Boyd* vs. *United States*, 116 U. S., 616, a statute was under review which authorized the Court in revenue cases to compel the defendant to produce any papers tending to prove the Government's case. It was held repugnant to the 4th and 5th Amendments. In an earlier decision by a United States Circuit Judge, *United States* vs. *Mason*, 6 Bissell, 350, the statute had been held constitutional on the ground that the proceeding, being *in rem*, was not against persons but against property and that therefore the act did not require the claimants to furnish evidence *against themselves* contrary to the 15th Amendment.

The Court observed that it could not

> "see the force of this distinction, nor can we assent to the proposition that the proceeding is not in fact a proceeding against the owner of the property as well as against the goods, for it is his breach of the laws that has to be proved to establish the forfeiture and it is his property which is sought to be forfeited. And to require such an owner to produce his private books and papers in order to prove his breach of the laws and thus to establish the forfeiture of his property, is surely compelling him to furnish evidence against himself. In the words of a great judge, 'Goods as goods cannot offend, forfeit, unlade, pay duties or the like, but men whose goods they are.' * * * Although the owner of goods sought to be forfeited by a proceeding *in rem* is not the nominal party he is nevertheless the substantial party to the suit."

(The "great judge" whose words are referred to above is Vaughan, C. J., and the language quoted is that in *Shepperd* vs. *Gosnold*, Vaughan 159, 172, approved by Parker, C. B., in *Mitchell* vs. *Torup*, Parker, 227, 236.)

The service of process on a ship in an action *in rem* in admiralty (apart from the necessity of placing the vessel within the control of the Court so that its jurisdiction over the *res* may not be ousted by a removal of the *res* itself) is merely a method of giving notice to its owners. The action, while in form against the ship, is in reality against the owners of the ship, brought into Court by such constructive notice as is given them by the seizure of their property and the issuance of a general citation to the world. That the service upon the vessel and its seizure is in fact a mere mode of notice to the owner is argued by counsel for appellant (pages 123 to 125 of Brief for Appellant). The cases cited by them show that not only is the *notice* of the suit really directed to the owner, but that the entire proceeding is, despite its form, one *against* the owner.

In one of the cases cited, *The Parlement Belge*, L. R. 5 P. D., 197, answering a question which he himself propounds:

> "Is it true to say that an action *in rem* is only and solely a legal procedure *against the property*, or is it not rather a procedure indirectly if not directly *impleading the owner of the property* to answer to the judgment of the Court to the extent of his interest in the property?"

Brett, L. J., says:

> "This proposition (a matter previously discussed) would determine the first question * * * even if an action *in rem* were held to be a proceeding solely against property and not a procedure directly or indirectly impleading the owner of the property to answer to the judgment of the Court. *But we cannot*

allow it to be supposed that in our opinion the owner of the property is not indirectly impleaded. The course of proceeding undoubtedly is first to seize the property. It is undoubtedly not necessary, in order to enable the Court to proceed further, that the owner should be personally served with any process. In the majority of cases brought under the cognizance of an admiralty court no such personal service could be effected. Another course was therefore taken from the earliest time. The seizure of the property was made by means of a formality which was as public as could be devised. That formality of necessity gave notice of the suit to the agents of the owner, and so, in substance to him, besides which by the regular course of the admiralty, the owner was cited or had notice to appear to show cause why his property should not be liable to answer to the complainant. The owner has a right to appear and show cause, a right which cannot be denied. It is not necessary, it is true, that the notice or citation should be personally served. But, unless it were considered that, either by means of the publicity of the manner of arresting the property, *or by means of the publicity of the notice or citation,* the owner had an opportunity of protecting his property from a final decree by the Court, the judgment *in rem* of a Court would be manifestly contrary to natural justice."

Speaking of a case that had been cited to show that an action *in rem* was in substance a proceeding against the property and not the owner, the Court tritely remarked:

> "It does *not* decide that a Court which seizes and sells a man's property does not assume to make that man subject to his jurisdiction."

Historically, as we shall hereafter show, the admiralty action *in rem* grew out of a practice exactly similar to

r foreign attachment—the ship being seized not because it was "liable irrespective of who owned it," nor even because it was subject to a specific lien, but merely because it was property within the jurisdiction, belonging to a non-resident debtor or one who could not be personally served. Only because of the conflict with the courts of common law in which the latter prohibited admiralty proceedings against individuals personally, was the fictional action *in rem*—"against the thing"—adopted, and the admiralty court "driven to arrest property in the first instance on the ground of hypothecation or lien, so as to have jurisdiction *quo ad* the *res* and avoid jurisdiction *quo ad* the owner."

> Mears' Admiralty Jurisdiction (Selected Essays in Anglo-American Legal History), Vol. II, p. 348 and note 4. This essay forms the introductory chapter of the Third Edition of Roscoe's "Admiralty Jurisdiction and Property" (1903).

Moreover, as we shall hereafter show, the act under consideration in the case at bar would be valid, even were we to adopt the views of Justice Loring in their entirety. The Massachusetts Act made no provision for any modification of the decree after its rendition on behalf of one not personally served before judgment. The dissenting opinion expressly concedes that

> "It would be within the constitutional power of the legislature to enact that the effect of some such decree as is provided for in this act (the Massachusetts Torrens Act) when properly proclaimed and served, should have the effect to put the claimant in

possession of the title so set up, and that if that possession continued unbroken, and the decree setting up the applicant's title remained in force unmodified for a specific time, all the world should be barred."

Compare, also, the language of the opinion distinguishing *Shepherd* vs. *Ware,* 46 Minn., 174.

The act here under discussion, as construed by the Supreme Court of the State, permits any person served only by publication, to appear within one year after the rendition of the decree and upon a bare showing of that fact and the statement of facts showing a defense to the action, to have the decree vacated as to him and be allowed to answer to the merits.

Hoffman vs. *Superior Court,* 151 Cal., 386, 393;
Gray vs. *Lawlor,* 151 Cal., 352.

The act is therefore sustainable if all other grounds were absent, and even under the views expressed by Mr. Justice Loring in his dissenting opinion, for the reason that as to unknown claimants not personally served with process, it is (like the Burnt Records Act of Illinois, with practically identical provisions)

"in effect a statute of limitations, and under the circumstances * * * not unreasonable but demanded as a matter of safety in a great emergency."

Gormley vs. *Clark,* 134 U. S., 338, 346, 347, and cases cited.

While these proposition (hereinafter discussed) show that the views of Justice Loring as to the historical nature of admiralty proceedings *in rem* are incorrect, and that the statute here involved would be valid under the

express concessions made by him, his contention that the nature and limitations of proceedings *in rem* render it impossible for a legislature to prescribe such a proceeding to quiet title to land, may be briefly considered.

The assumption of Mr. Justice Loring that a State is without power to authorize a proceeding *in rem* to try title to property rests, when analyzed, entirely upon the suggestion that proceedings *in rem* had not theretofore been used for that purpose. To this there are two answers, either of which is conclusive. One is that such proceedings *have* been used to adjudicate title to property.

Various historical analogies are stated and considered in the opinion of Chief Justice Holmes in that case. Proceedings strictly *in rem* have been universally employed in probate proceedings in the settlement of the estates of absentees, in actions to confirm tax titles, in suits for the collection of taxes, in proceedings for the enforcement of eminent domain, to establish escheats, etc. The distinctions attempted between these proceedings and those in the case at bar are hereafter considered, but it may be pointed out, as it was by Chief Justice Holmes in *Tyler* vs. *Judges,* that the validity and conclusive effect of probate decrees, as also of proceedings *in rem* to establish escheats (which were held valid in *Hamilton* vs. *Brown,* 161 U. S., 256)

> "is not put upon the ground that the State has an absolute power to determine the persons to whom a man's property shall go at his death, but upon the characteristics of a proceeding *in rem.*"

Thus, in the escheat case referred to (*Hamilton* vs. *Brown*, 161 U. S., 256) it is said:

> "As to personal property indeed a judgment *in rem* after notice by publication only, might not bind persons who had no actual notice of the proceedings unless the thing had been first seized into the custody of the Court. (Citing cases.) But it was within the power of the legislature of Texas to provide for determining and quieting the title to real estate within the limits of the State and within the jurisdiction of the Court after actual notice to all known claimants and notice by publication to all other persons." (Citing *inter alia Arndt* vs. *Griggs*, 134 U. S., 316, and *Hardy* vs. *Beatty*, 84 Tex., 562, the first a suit to quiet title, and the second an action for specific performance against unknown heirs sued by general designation.)

Proceedings to distribute the estates of absentees like those for the settlement of decedents' estates, are, of course, strictly *in rem* as against all claiming rights of succession. They, however, have an added feature in that they deal with the vested rights of persons who may be living. They necessarily proceed upon constructive notice, and they have their justification not only in the sovereign power of a State to make certain the title to land within its boundaries, but also in the fact that power to prescribe such proceedings has historically been always and everywhere conceded and exercised.

> *Cunnius* vs. *Reading School District*, 198 U. S., 458, affirming 206 Pa., 469; 98 Am. St. Rep., 796; 56 Atl., 16.

The second answer to the argument of Mr. Justice Loring is that it is quite immaterial whether proceedings

in rem have or have not been heretofore used to try title to real property. There is no provision, expressed or implied, in the Federal Constitution which prohibits their use for this purpose and the control which a State has over its forms of procedure and the methods of administering justice in its courts make it competent for its legislature to prescribe a proceeding *in rem* for this purpose if, in its opinion, such legislation be proper and advisable.

In this connection it should be made plain that the right of a State to provide a proceeding *in rem* for the purpose of trying title to real property does not necessarily involve a concession that in every case the mere seizure of the property must in and of itself be relied upon as means of notice to the world. In admiralty proceedings the theory of the law is that the seizure of the property "or the publicity of the citation to the world" (*The Parlement Belge*, L. R., 5 P. D., 218) will afford a means of notice to the owners. The seizure of the property, however, is but one form of notice which may be employed in a proceeding *in rem*. In admiralty proceedings such seizure has perhaps a two-fold purpose; first, to bring the *res* within the control of the Court and thus prevent its removal; secondly, to give such notice as the seizure may afford, to persons interested in the pending proceeding. In the case of land lying within the jurisdiction of the Court, seizure is, of course, unnecessary to prevent removal of the *res* or to vest the Court with control over it, and, as shown by the authorities cited under the next heading of this brief, such control by the Court may in the case of real property be acquired

without actual seizure and by the mere bringing of a suit describing the land. Seizure of the *res* being thus in the case of land unnecessary to vest the Court with power to control it, if the action is *in rem*, the Legislature has the right and power to prescribe other forms of notice reasonably suited to the nature of the case and which would afford due process of law in such a case quite as effectively as does service of the writ on a ship in an admiralty proceeding *in rem*.

The statute here under consideration not only requires service of process upon the *res* itself by prescribing that a copy of the summons be posted thereon, and for "the immediate recording of the claim" which, in the opinion of Mr. Justice Holmes, was "entitled to equal effect from a constitutional point of view" with actual seizure, but it provides for actual service of process upon every known claimant who can be personally served within the state, it provides for service by mail upon every non-resident who can be so served, and it provides for the fullest constructive notice to all other claimants not only by the *media* already mentioned, but by requiring a publication of the summons at least once a week for a period of two months in a newspaper of general circulation, published in the county where the land affected lies.

If, as held in *Hamilton* vs. *Brown*, 161 U. S., 256, 274, it is within the power of a state to

> "provide for determining and quieting the title to real estate within the limits of the state and within the jurisdiction of the court, after actual notice to all known claimants and notice by publication to all other persons,"

it must be conceded that this act, whether its procedure be or be not called strictly *in rem*, provides a notice which conforms to every requirement of due process of law.

We submit that a State has the power to provide a proceeding strictly *in rem* to try the title to real property. If it has not, its lack of power should rest upon some plainly expressed provision of the fundamental law. No such provision exists. We shall hereafter cite many cases in which proceedings similar in form to that provided by the statute under discussion have been held to be not only strictly *in rem*, but within the undoubted competency of a legislature to prescribe.

V.

THE PROCEEDING PRESCRIBED BY THE STATUTE IS ONE "STRICTLY IN REM."

Having established, as we believe, that the legislature of California *could* authorize such a proceeding, it remains to determine whether it *has* in fact done so. If it had the power to do so, and has in fact done so, it is conceded by counsel for appellant that the judgment of the Superior Court here attacked is valid and conclusive.

Is then the proceeding provided by the statute one strictly *in rem?*

The act provides for the bringing of an action "*in rem against all the world* * * * to establish title to such property and to determine *all* adverse claims thereto." A copy of the summons, together with a copy of the memorandum naming the persons known to claim adverse interests "*shall be posted in a conspicuous place on each separate parcel of the property de-*

scribed in the complaint within fifteen days after the first publication of the summons." The summons is required to be served by publication in a newspaper for a period of two months.

At the time of filing the complaint, the plaintiff must file with the county recorder a notice of the pendency of the action, and the recorder is required not only to record the same, but to plat the property affected by it with proper references upon a map.

Upon the completion of service of process by publication, posting, personal service and mailing, it is provided that

> *"the court shall have full and complete jurisdiction over the plaintiff and the said property * * * and shall be deemed to have obtained the possession and the control of said property for the purposes of the action and shall have full and complete jurisdiction to render the judgment therein which is provided for in this act."*

By section 11 of the statute, it is provided that

> *"the judgment shall ascertain and determine all estates, rights, titles, interests and claims in and to said property and every part thereof, whether the same be legal or equitable, present or future, vested or contingent, or whether the same consist of mortgages or liens of any description, and shall be binding and conclusive upon every person who, at the time of the commencement of the action, had, or claimed, any estate, right, title, or interest in or to said property, or any part thereof, and upon every person claiming under him by title subsequent to the commencement of the action."*

If it be possible to devise a proceeding strictly *in rem*

to try the title to land, the legislature has done so in this proceeding.

> "*A judgment in rem is an adjudication pronounced, as its name denotes, upon the status of some particular subject-matter by a tribunal of competent authority for that purpose.*"
>
> *Martin* vs. *King,* 72 Ala., 354;
>
> *State* vs. *McMurry,* 61 Kan., 87; 58 Pac., 962;
>
> *Ex parte Kenmore Shoe Co.,* 50 S. C., 140; 27 S. E., 682.

A proceeding *in rem* is frequently defined as a proceeding against the thing itself and in which process is served upon the thing itself, and these are among the distinguishing characteristics which counsel for appellant seek to confer upon it. While in many proceedings strictly *in rem* the action is in form one *against the thing,* naming no persons as parties, and the process is served *upon the thing* (with the accompaniment, however, in every, or nearly every case, of other constructive notice by publication or otherwise to those interested), such is by no means universally true, and any distinction based upon these features would be one of form rather than one of substance. In many cases, such for instance as probate proceedings, which are concededly strictly *in rem,* there is no tangible thing. It, of course, cannot be served with process, nor is it ordinarily named as the defendant.

In his work on Judgments, summarizing an exhaustive review of the nature of judgments *in rem,* and after considering the numerous definitions of such judgments and of proceedings *in rem,* Mr. Freeman says:

"But from none of these descriptions can a complete and correct idea of the class now known as '*judgments in rem*' be obtained. The definition first quoted was particularly inaccurate in asserting that judgments of this class must proceed from 'a court of exclusive or at least peculiar jurisdiction.' For, in truth, all kinds and classes of courts *may proceed in rem whenever the law authorizes them to do so.* The description given by Chief Justice Marshall places too much stress upon the idea that the thing upon which the judgment operates should be taken into possession on or by the service of process, and *ignores a large class of cases in which, instead of proceeding against anything,* courts adjudicate upon the status of persons, and obtain their authority to do so by the service of process which, whether actual or constructive, is still in its nature personal. * * *

"*Judgments in rem, it is well known, are not, as the name implies, confined to adjudications against things.* * * * *The distinguishing characteristic of judgments in rem is that wherever their obligation is recognized and enforced as against any person, it is equally recognized and enforced as against all persons. It seems to us that the true definition of a judgment in rem is that it 'is an adjudication "against some person or thing,' or 'upon the status of some subject-matter' " which, wherever and whenever binding upon any person is equally binding upon all persons.* * * * *We therefore suggest that a judgment is in rem whenever the process and proceedings are such as to warn all persons that the court may render judgment affecting certain property and their interests therein, and that they must, at or within a time specified, appear before the court, if they wish to protect those interests from judicial condemnation.* The fact that under the mode of serving process provided by law, some claimant, or even all claimants of the property do not receive actual notice of the proceeding will not prevent the

judgment from operating *in rem* if the mode adopted was reasonable under the circumstances and calculated to give notice to the claimants, and the notice was such as that the claimants, had it been seen by them, should have known therefrom that their interests were or might be imperiled and that they might be heard for the preservation of such interests."

Freeman on Judgments, Sec. 606.

The title of the action, of course, does not determine its nature. It would not alter the essential character of the proceeding provided for by this statute were it entitled "In the Matter of the Title to Block 64 in the City and County of San Francisco," or "John Smith vs. Block 64 in the City and County of San Francisco." As it is tersely put by Mr. Justice Holmes in *Tyler* vs. *Court of Registration*, 175 Mass., 71,

> "*Naming the res as defendant*, although a convenient way of indicating that the proceeding is against property alone, that is to say, that it is not to establish an infinite personal liability, *is not of the essence. If, in fact, the proceeding is of that sort and is to bar all the world, it is a proceeding in rem.*"

So in *Corson* vs. *Shoemaker*, 55 Minn., 386; 57 N. W., 134, where a statute very similar to that involved in the case at bar was under examination, in considering the question whether the proceedings operated *in rem*, the court compared it with tax proceedings, admittedly *in rem*, and said:

> "Are the proceedings for the collection of taxes really any more in the nature of a proceeding *in rem* than is this action? Where is the distinction? The property is not seized until after judgment. *We do not proceed directly against the land.*"

Does the proceeding then answer the description of a proceeding *in rem* so far as *seizure of the res* is concerned? We submit that it does. Process is actually served upon the thing itself. A copy of the summons and the memorandum is required to be posted "in a conspicuous place on each separate parcel of the property described." A *lis pendens* is required to be filed with the county recorder describing the property. The statute has provided that the service of process in the manner contemplated by the statute shall vest the court "with full and complete jurisdiction over the property" and that the court "shall be deemed to have obtained the possession and control of the property for the purposes of the action." If this be not a seizure of the *res*, there can be no seizure of the *res* in the case of land, except an actual custody of it, and that has never been held essential, even in the case of an admiralty proceeding where the property involved is personalty and its control for the purpose of retaining it within the jurisdiction of the court is all important.

In *Cooper* vs. *Reynolds*, 10 Wall., 308, Mr. Justice Miller, speaking of the jurisdiction of the *res* acquired in a proceeding *in rem*, says:

> "Jurisdiction of the *res* is obtained by a seizure under process of the court, whereby it is held to abide such order as the court may make concerning it. The power to render the decree or judgment which the court may undertake to make in the particular cause depends upon the nature and extent of the authority vested in it by law in regard to the subject-matter of the cause.
>
> "It is to be observed that in reference to jurisdiction of the person, the statutes of the states have

provided for several kinds of service of original process short of actual service on the party to be brought before the court, and the nature and effect of this service and the purpose which it answers depend altogether upon the effect given to it by the statute. *So also, while the general rule in regard to jurisdiction in rem requires the actual seizure and possession of the res by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import and which stand for and represent the dominion of the court over the thing and, in effect, subject it to the control of the court.* Among this latter class is the levy of a writ of attachment or seizure of real estate, *which, being incapable of removal and lying within the territorial jurisdiction of the court, is for all practical purposes brought under the jurisdiction of the court by the officer's levy of the writ and return of that fact to the court.* So the writ of garnishment or attachment, or other form of service, on a party holding a fund which becomes the subject of litigation brings that fund under the jurisdiction of the court, *though the money may remain in the actual custody of one not an officer of the court.*"

The language of Mr. Justice Miller in this case is the authority most frequently cited as showing that jurisdiction *in rem* may be acquired not only by actual seizure and custody, but by acts of "equivalent import," and the cases cited to this point, collected in Rose's notes to U. S. Reports, page 321, illustrate the numberless instances in which the principle has been applied.

In *Bennett* vs. *Fenton*, 41 Fed., 283, 10 L. R. A., 500, where the Minnesota statute providing for the quieting of title was under examination, Shiras, J., delivering the opinion of the Court, said:

"It becomes essential, therefore, to ascertain the nature of the power conferred upon the courts of Minnesota by the statute already quoted, under the provisions of which the suit of *Lord* vs. *Henry* was instituted. In brief, the purpose of the statute is to enable parties, whether in possession of realty, or where the same is vacant and unoccupied, to settle adverse claims thereto, and determine the ownership and consequent right of possession thereto. No suit can be brought under this statute without describing the particular realty in question, nor can a complaint be so framed as not to limit the litigation to the realty named in the complaint. The real object sought to be accomplished is to settle and quiet the title in the complainant to the particular realty, and the statute provides that the decree rendered after the lapse of a specified time may have the force and effect of a deed. Practically, the decree operates on the land, and it is difficult to see why the same cannot be sustained as well as in cases wherein partition is made, or wherein condemnation is had for public purposes. In some of the decided cases, it is held that to give jurisdiction *in rem* there must be seizure, in some mode, of the realty, under process of the Court, for the double purpose of bringing the property under control of the Court, and of insuring notice to the defendant. In proceedings for partition or for condemnation for public use, or for foreclosure of a mortgage, a writ or process is not issued for the seizure of the property, and yet these proceedings are held to be *in rem*. *In such cases the record shows, at the very initiation of the proceeding, the particular property that is sought to be dealt with, and the Court obtains control over the property just as effectually by the initiation of the proceedings as it does by the levy of a writ on the same.* In cases wherein the right of action does not grow out of the property itself, and where the petition or bill does not describe any particular property as the subject-matter of the litigation, as in cases for the recovery of debts aided

by attachments, it is clear that no property is brought within the control of the Court, except through the issuance and levy of process; and in this class of cases such levy is absolutely necessary in order to affect the property by the proceedings taken in the case. *So far as notice to the defendant is concerned, is not this secured as well by the filing of a bill describing the realty sought to be affected as by the issuance of a writ of attachment, the levy thereof and return by the sheriff or other officer?* Such writ and return become part of the files or record of the case, and, so far as notice to the defendant is concerned, they are not more effectual than the filing of the bill in an action to quiet title."

The Court, after pointing out that under the Minnesota statute the decree of the equity court operates not *in personam* but directly upon the title to the property, speaks of the action as one where the state has, "by proper enactment, provided for a proceeding *against the property*, to quiet the title."

In the case of *Tyler* vs. *Judges of Court of Registration*, 175 Mass., 71; 55 N. E., 812; 51 L. R. A., 433, frequently cited in this brief, in which the Torrens Act of Massachusetts was upheld as constitutional, Mr. Justice Holmes answers the proposition that it did not provide a proceeding *in rem* because the *res* was not seized, as follows:

"So as to seizure of the *res*. It is convenient in the case of a vessel, in order to secure its being on hand to abide judgment, although in the case of a suit against a man, jurisdiction is regarded as established by service, without the need of keeping him in prison to await judgment. It is enough that the personal service shows that he could have been seized and imprisoned. Seizure, to be sure, is said

to be notice to the owner. *Scott* vs. *Shearman*, 2 W. Bl., 977, 979; *Mankin* vs. *Chandler*, 2 Brock., 125, 127, Fed. Cas. No. 9030. But fastening the process or a copy to the mast would seem not necessarily to depend for its effect upon the continued custody of the vessel by the marshal. However this may be, *when we come to deal with immovables, there would be no sense whatever in declaring seizure to be a constitutional condition of the power of the Legislature to make a proceeding against land a proceeding in rem.* *Hamilton* vs. *Brown*, 161 U. S., 256, 274; 16 Sup. Ct., 585; 40 L. Ed., 691. The land cannot escape from the jurisdiction, and, except as security against escape, seizure is a mere form, of no especial sanctity, and of much possible inconvenience.

"I do not wish to ignore the fact that seizure, when it means real dispossession, is another security for actual notice. But when it is considered how purely formal such an act may be, and that even adverse possession is possible without ever coming to the knowledge of a reasonably alert owner, I cannot think that the presence or absence of the form makes a constitutional difference; or rather, to express my view still more cautiously, I cannot but think that the immediate recording of the claim is entitled to equal effect from a constitutional point of view."

As indicated in *Cooper* vs. *Reynolds*, 10 Wallace, 308, the only object of seizure in a proceeding *in rem* is to bring the property within the control of the Court so that the judgment may be enforced. To this effect, also, is

Pennoyer vs. *Neff*, 95 U. S., 714.

Where, as is the case with real property, the *res* is im-

movable, no such proceeding is required to bring it within the jurisdiction of the Court, and seizure is unnecessary.

Roller vs. *Holly*, 176 U. S., 398, 406;
Overby vs. *Gordon*, 177 U. S., 214, 221.

Thus, in *Heidritter* vs. *Elizabeth Oilcloth Co.*, 112 U. S., 294; 5 Sup. Ct. Rep., 135, it was held that an action to bind land by enforcing a specific lien thereon, operated, so far as the land was concerned, *in rem*, and *the mere filing of the bill was equivalent to a seizure.*

> "In such cases the land itself must be drawn within the jurisdiction of the Court by some assertion of its control and power over it. This, as we have seen, is ordinarily done by actual seizure, *but may be done by the mere bringing of the suit in which the claim is sought to be enforced, which may by law be equivalent to a seizure, being the open and public exercise of dominion over it for the purposes of the suit.*"

In another portion of the opinion, Mr. Justice Matthews paraphrases the language of Justice Miller in

Cooper vs. *Reynolds, supra,*

requiring seizure, or "acts which are of equivalent import," by remarking that "such acts may be the levying of a writ, *or the mere bringing of a suit.*"

As said by the United States Supreme Court in a recent case, *Leigh* vs. *Green*, 193 U. S., 79:

> "Where land is sought to be sold and is described in the notice, a technical service upon it would add nothing to the procedure where the owner is unknown. *The publication of notice which describes the land is certainly the equal in publicity of any seizure which can be made of it.*"

Cases illustrating the point that actual seizure is not essential to a proceeding *in rem* might easily be multiplied. This, however, could serve no useful purpose. It is evident from the authorities which have been cited to the point that merely constructive seizure, and in the case of real property the mere filing of a bill, are sufficient as "acts of equivalent import."

Moreover, only the party in "actual and peaceable possession" of the land is by this statute authorized to take advantage of the proceedings contemplated by it. He, in effect, brings the land into court by filing his bill. Actual seizure in such a case could not be more than a fiction and would be wholly useless as notice to any party concerned.

In the proceeding authorized by this statute, every form of seizure of which real property is capable, short of actual custody by an officer of the court, is provided. There is a filing of the bill, the writ is served by posting upon the land itself, and the land is further brought within the dominion and control of the court as against third persons by the filing of a notice of the pendency of the action brought to affect it. The property is brought into court to abide the decree by the party in possession of it. In all of the essentials, therefore, the proceeding authorized by this statute answers to the most limited definition of a strict proceeding *in rem*.

But the legislature has sought to remove every question of its intention by, in terms which admit of no equivocation, declaring it to be "*an action in rem against all the world.*" It addition to giving it all the faculties of a proceeding *in rem*, it has named it such. It may be

admitted, as is so strenuously urged in counsel's brief, that the legislature cannot, by naming a remedy, change its nature. It must, however, be admitted, that where the legislature has sought to impress upon a proceeding every characteristic which is essential to a proceeding strictly *in rem*, and then, as if to put its intention beyond doubt or dispute, has designated it "*an action in rem against all the world*," there can be but little play for construction, and the only question remaining is, *Had the legislature power* to make a proceeding of this class one *in rem?*

As said by Chief Justice Holmes:

> "All proceedings, like all rights, are really against persons. Whether they are proceedings or rights *in rem* depends upon the number of persons affected."
>
> *Tyler* vs. *Judges of Court of Registration*, 175 Mass., 71.

The intention of the legislature in this statute to provide a notice to all the world, and its intention to provide a proceeding which should bind all persons, is plain. The action is, therefore, not *in personam* but *in rem.*

Overby vs. *Gordon*, 177 U. S., 214, 221.

We have already shown that it is within the power of a State to provide a proceeding *in rem* in the class of cases contemplated by the statute. We submit it to be equally plain that the State of California has exercised that power in the statute under consideration.

VI.

WHETHER OR NOT THE PROCEEDING AUTHORIZED BY THE ACT IS ONE STRICTLY IN REM OR SUBSTANTIALLY IN REM IS IMMATERIAL. IN BOTH JURISDICTION RESTS UPON THE SAME BASIS, AND THE DECREES IN BOTH HAVE EQUAL POTENCY AS TO THE RES.

If it were essential, in order to sustain the judgment here attacked, to hold that the proceeding in which that judgment was rendered was one strictly *in rem*, we submit that the action was plainly of that nature. We believe, however, that the case depends upon no distinction such as that between actions strictly and those substantially *in rem*.

If the notice prescribed by the statute answers the requirements of "due process of law," there need be no determination whether the action is one strictly *in rem* or not.

Johnson vs. *Hunter*, 127 Fed., 219.

The question really is, as stated in *Shepherd* vs. *Ware*, 46 Minn., 174; 48 N. W., 773; 24 Am. St. Rep., 212:

> "Whether the Legislature has the power in actions to determine adverse claims to real property to authorize proceedings by action against unknown claimants and bind them by constructive notice thereof."

The answer to this lies not in the form or technical name of the procedure prescribed, but depends upon broader considerations—the power of a State to settle conclusively the title to land within its boundaries and the reasonable-

ness of the notice afforded to those affected by the decrees of its courts.

> "In such cases we are not compelled to soar after the infinite nor delve after the unfathomable in search of refined distinctions without substantial differences."

Corson vs. *Shoemaker*, 55 Minn., 386; 57 N. W., 134.

Counsel for appellant argue that the rights of unknown claimants can be reached only by a proceeding strictly *in rem*. This, however, is merely one step in an endeavor to show that the claims of such persons cannot be reached *at all*. For (as we have seen) it is contended by counsel that a State *cannot* prescribe a proceeding strictly *in rem* to determine title to property. Under this view the Fourteenth Amendment deprives the State of any power to adjudicate the title to property within its limits as against the claims of persons who being unknown cannot be designated by name. To the State it says, "You cannot provide a proceeding *in rem* for this class of cases," and at the same time "Unless you do provide a proceeding *in rem*, you cannot adjudicate the title of unknown claimants." Plainly stated, appellant's contention is that

> "the courts of a State cannot in any manner acquire jurisdiction to clear the title to real estate by a decree binding all interests and all parties known and unknown,"

a conclusion which the Supreme Court of Minnesota regarded as destroying the effect of any argument which led to it (*State ex rel Douglass* vs. *Westfall*, 85 Minn., 437; 89 N. W., 175).

In the exercise of its power to provide for the settlement of title to real property lying within it, a State may avail itself of three classes of proceedings; proceedings strictly *in rem,* proceedings substantially *in rem,* and proceedings *in personam.*

Each of these forms of action differs from the others.

A proceeding *in personam* affects no *res,* except by controlling the action of the parties in respect to it.

A proceeding *in rem* is one which operates directly on a *res* within the jurisdiction of the court, and is in its usual form against the *res* rather than named personal defendants. By seizure of the *res* and the issuance of notice to the world it impleads all who are interested and calls upon them to appear and defend.

An action substantially *in rem* is in form a suit against parties and binds the rights only of those impleaded as such, but it operates directly upon a *res* within the control and disposition of the Court. The parties may be few in number or they may be many. They may be sued by their proper names, or, as we shall show, they may, where this is impracticable (as where they are unknown), be sued by general designation if the Legislature so provides. Whether sued by name or by general designation they are parties to the action, and, if given reasonable notice of its pendency and afforded the right to appear and defend, their rights in the *res* will be concluded by the decree.

With the limitations of proceedings *in personam* we are not here concerned. It is conceded by counsel for appellant that the proceedings taken in the Superior

Court of San Francisco by appellee were at least substantially *in rem*.

We submit, and shall, we believe, show, that whether the proceeding be strictly or substantially *in rem*, a State may authorize its courts to determine the title to a *res* within its limits as against all persons, resident or non-resident, known or unknown, who are afforded reasonable notice and an opportunity to appear and defend. The distinction which *is* here applicable is one which depends on the presence or absence of jurisdiction over the *res*—the distinction between proceedings strictly or substantially *in rem*, on the one hand, and proceedings which operate merely *in personam*, on the other.

Equity originally acted only *in personam*.

> "In the infancy of the court of chancery, while the chancellors were developing their system in the face of a strong opposition, in order to avoid a direct collision with the law and with the judgments of law courts, they adopted the principle that their own remedies and decrees should operate *in personam* upon defendants, and not *in rem*. The meaning of this simply is, that a decree of a court of equity while declaring the equitable estate, interest or right of the plaintiff to exist, did not operate by its own intrinsic force to vest the plaintiff with the legal estate, interest or right to which he was pronounced entitled; it was not itself a legal title, nor could it either directly or indirectly transfer the title from the defendant to the plaintiff. A decree of chancery spoke in terms of personal command to the defendant, but its directions could only be carried into effect by his personal act. It declared, for example, that the plaintiff was equitable owner of certain land, the legal title of which was held by the defendant, and ordered the defendant to execute a conveyance of the estate; his own voluntary act was necessary to

carry the decree into execution; if he refused to convey, the Court could endeavor to compel his obedience by fine and imprisonment. The decree never stood as a title in the place of an actual conveyance by the defendant; nor was it ever carried into effect by any officer acting in the defendant's name."

1 Pomeroy's Equity Jurisprudence, Sec. 428.

In the exercise of its *inherent* power, therefore, a court of equity ordinarily proceeds *in personam* only.

Perkins vs. *Wakeham*, 86 Cal., 581; 21 Am. St. Rep., 67;

Peninsular etc. Co. vs. *Pacific Steam etc. Co.*, 123 Cal., 689;

Venable vs. *Dutch*, 37 Kan., 515; 15 Pac., 520; 1 Am. St. Rep., 262;

Dillon vs. *Heller*, 39 Kan., 599; 18 Pac., 693;

Ormsby vs. *Ottman*, 85 Fed., 492;

Hart vs. *Sansom*, 110 U. S., 151;

Arndt vs. *Griggs*, 134 U. S., 316.

In the present case, however, as in most cases of suits to quiet title under modern statutes, we have to deal not with the inherent power of a court of equity, but with an authority bestowed by statute.

"The question is not what a court of equity by virtue of its general powers and in the absence of a statute might do, but it is, what jurisdiction has a state over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts to determine the validity and extent of the claims of non-residents to such real estate? * * * It cannot bring the person of a non-resident within its limits—its process goes not out beyond its bor-

ders—but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide reasonable methods of imparting notice."

Brewer, J., in *Arndt* vs. *Griggs*, 134 U. S., 320.

"In the absence of statutory authority for the bringing of an action to quiet title, if a claimant of realty invokes the aid of a court of equity to settle the adverse claims made by another, he puts in motion the ordinary equitable pwers of the court which are exercised *in personam*—that is, through the control of the court over the person of the defendant—in which case, personal service upon the defendant within the territorial limits of the jurisdiction of the court is essential to confer jurisdiction upon the court. In case, however, the State has by statute provided that the title to realty within its borders may be settled by a proceeding for the quieting of the title wherein the court is required to investigate the title to a particular tract of land, and has provided that in case an adverse claimant is a non-resident of the State, service by publication may be made, then the court is not proceeding under its ordinary equitable power with the limitations pertaining thereto, but is proceeding under the power and rights conferred by the statute. Unless it be held that the State can, by proper enactment, provide for a proceeding against the property to quiet title, and in case of non-residents provide for service by publication, or its equivalent, then it is practically put beyond the power of the State to secure to its citizens the means by which their right and title to realty may be settled. * * *

"If, by the provisions of the statute, the decree itself states the status of the title and the right to possession and control of the land without the necessity of enforcing the decree by actual control over the person of the defendant, then the suit

and decree directly affect the land and are in the nature of a proceeding *in rem.*"

Shiras, J., in *Bennett* vs. *Fenton*, 41 Fed., 283; 10 L. R. A., 500;

See to the same effect,

Perkins vs. *Wakeham*, 86 Cal., 581; 21 Am. St. Rep., 67;

Tyler vs. *Judges of Court of Registration*, 175 Mass., 71; 55 N. E., 812; 51 L. R. A., 433;

Corson vs. *Shoemaker*, 55 Minn., 386; 57 N. W., 134;

Hardy vs. *Beatty*, 84 Tex., 562; 19 S. W., 778; 31 Am. St. Rep., 80;

McLaughlin vs. *McCrory*, 55 Ark., 442; 18 S. W., 762.

The decree in the proceeding authorized by the statute under consideration does, of course, operate to directly affect the title to the land. Stronger language than that employed in Section 11 of the act to effect this purpose could not be suggested. The authorities are uniform that where a statute provides for a decree of this kind in a proceeding to quiet title, that proceeding becomes substantially *in rem.* The jurisdiction of the Court depends upon its jurisdiction over the *res.* The judgment of the Court operates directly upon the *res.* The proceeding, so far as it affects the claims of the parties to the property, has all the incidents of a proceeding *in rem*, and the rights of those affected by it may be adjudicated on substituted or constructive service of process.

Before considering the cases which deal with the nature and effect of a proceeding substantially *in rem*, it is proper to say that we are fully aware that counsel concede the right of the State in such a proceeding to bind the property of *non-residents* who being known by name are sued by name. We fully appreciate also their contention that a proceeding substantially *in rem*, while it affects the *res*, is one which binds only those who are *parties* to the proceeding.

The concession first mentioned, does not, however, render unnecessary or improper a consideration of the cases which declare the principle and rationale of the rule that a State may, in proceedings substantially *in rem*, bind the property of non-resident claimants who are themselves beyond reach of the process of its courts. These cases show the nature of such proceedings and establish the necessity and existence of the power, inherent in sovereignty, to conclusively settle and adjudicate the title to property within its territorial jurisdiction, upon reasonable notice to those who cannot be reached and bound by personal service of its process.

The proposition that a proceeding substantially *in rem* binds only the *parties* to the action is undoubted. We shall hereafter show, however,—what may seem to the Court to be self evident—that in the proceedings prescribed by the statute under discussion, unknown claimants are impleaded and made parties to the action. They, with all other persons "claiming any interest in or lien upon the property" involved, are sued as defendants, are afforded notice of the proceeding by every known form of public monition and citation, and have the full

right to appear and defend. The power of a State to determine and settle the rights of undisclosed claimants to property within its jurisdiction in a proceeding substantially *in rem*, is as we shall hereafter show, entirely plain and settled by authority. Indeed, while this proposition is discussed under a separate heading of this brief, a number of the cases which we are about to consider are cases in which the right of a State to bind all persons *known and unknown* in proceedings of this class is considered and upheld.

The authorities which follow are cited to show, that so far as property within the jurisdiction of the Court is concerned, proceedings *in rem* and *quasi in rem* stand upon the same basis, are governed by the same rules and have the same potency. One is always intended to bind the whole world as parties, the other may be directed against as many or as few parties as the Legislature allows to be impleaded and affords reasonable notice and the right to appear and defend.

Mr. Justice Field, in the course of his opinion in *Pennoyer* vs. *Neff*, 95 U. S., 714, an opinion which may be said to crystallize the law upon questions of territorial and extra-territorial jurisdiction, speaking of the sovereignty of a State and of its undoubted right to determine all questions concerning property lying within its boundaries, points out as one of the "principles of public law,"

> "that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. * * * Every State owes protection to its own citizens, and when non-residents deal with

> them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens. It is in virtue of the State's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into that non-resident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property."

Passing from this general principle to the control which a State may, by its decrees, exercise over the claims of non-residents to property situated within the State, the learned Justice observes that substituted or constructive service

> "may answer in all actions which are substantially proceedings *in rem*," it being "sufficient in cases where the object of the action is to reach and dispose of property in the State or of some interest therein by enforcing a contract or a lien respecting the same, or to partition it among different owners, or when the public is a party, to condemn and appropriate it for public use."

Control over property within a State being thus exercisable on constructive service of process in every proceeding "substantially *in rem*," the Court observes that

> "It is true that in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property without reference to the title of individual claimants. But in a larger and more general sense, the terms are applied to actions between parties where the direct object is to reach and dispose of property owned by them or of some interest therein. Such are cases commenced by attachment against the property of debtors or instituted to partition real estate, foreclose a mortgage or enforce a lien. So far as they

affect property in the State, they are substantially proceedings *in rem* in the broader sense which we have mentioned."

The same argument which is here made to show that a State legislature cannot, as to property within the limits of the State, make provision for a decree which shall bind unknown claimants, has been addressed to courts in almost innumerable cases where such a decree bound the rights of non-residents served by publication merely. It was contended in those cases, as it is in this, that a decree quieting title could operate only as against those parties to the action who could be reached and served with process; that jurisdiction over the *res* could be exercised so as to bind the rights of others only in a proceeding strictly *in rem*. To these arguments the courts have returned replies which are here equally applicable, and which are conclusive of the validity of this statute. Starting with the proposition that every State is sovereign over lands within its boundaries, they have held that in proceedings brought to affect the title to such property directly, the Court does not act *in personam* at all, but upon a *res*, admittedly within its jurisdiction, and that whether the proceeding be one strictly *in rem* or one substantially of that nature, the object being in either case to reach that *res*, a State has the right (after making provision for reasonable notice to parties interested), to make decrees respecting the title of that *res*, binding upon all persons.

Of the cases, one of the most important is

Arndt vs. *Griggs*, 134 U. S., 316; 10 Sup. Ct. Rep., 557.

In that case there was involved a statute of Nebraska authorizing a suit to quiet title in which non-resident defendants might be brought into Court by publication of process. The Court states the question to be,

> "Has a State the power to provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which the defendant, being a non-resident, is brought into court only by publication?"

Addressing itself to the objections urged against such a proceeding, and which, as we have said, are similar to those here urged, Mr. Justice Brewer, in language frequently quoted, says:

> "The propositions are that an action to quiet title is a suit in equity, that equity acts upon the person, and that the person is not brought into court by service by publication alone. While these propositions are doubtless correct as statements of the general rules respecting bills to quiet title, and proceedings in courts of equity, they are not applicable or controlling here. The question is not what a court of equity, by virtue of its general powers, and in the absence of a statute, might do, but it is, what jurisdiction has a state over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts to determine the validity and extent of the claims of non-residents to such real estate? If a State has no power to bring a non-resident into its courts for any purposes by publication, it is impotent to perfect the titles of real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a non-resident will remain for all time a cloud, unless such non-resident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the State. It has control over property within its limits; and the con-

dition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a non-resident within its limits—its process goes not out beyond its borders—but it may determine the extent of his title to real estate within its limits; and, for the purpose of such determination, may provide any reasonable methods of imparting notice. The well-being of every community requires that the title to real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in its nature. It is not a matter of national concern, or vested in the general government. It remains with the State; and, as this duty is one of the State, the manner of discharging it must be determined by the State, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the constitution, or against natural justice."

After referring to the principle laid down in *U. S.* vs. *Fox*, 94 U. S., 315, 320, that the power of a State to regulate the tenure of real property within her limits, is undoubted, the Court reviews at some length the cases decided by State courts, to the effect that proceedings to quiet title in which the decree directly affects the title, are, if not strictly *in rem*, substantially of that nature, and that so far as they "fix and settle the title to the land then in controversy, they partake of the nature of a judgment *in rem*." The decisions of the United States Supreme Court upon the subject are then exhaustively reviewed. Mr. Justice Brewer first quotes from the decision in *Boswell's Lessee* vs. *Otis*, 9 How., 336, where the Court said:

"Jurisdiction is acquired in one of two modes: First, as against the person of the defendant, by the service of process; or, second, by a procedure against the property of the defendant within the jurisdiction of the Court. In the latter case the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding *in rem*. A bill for the specific execution of a contract to convey real estate is not strictly a proceeding *in rem*, in ordinary cases; but where such a procedure is authorized by statute, on publication, without personal service or process, it is substantially of that character."

The opinion then reviews *Parker* vs. *Overman*, 18 How., 137, in which the Court, after referring to the "very great evil in any community" from titles to land insecure and uncertain, said:

"A prudent man will not purchase a law-suit, or risk the loss of his money and labor upon a litigious title. The act now under consideration was intended to remedy this evil. It is in substance a bill of peace. The jurisdiction of the Court over the controversy is founded on the presence of the property; and, like a proceeding *in rem*, it becomes conclusive against the absent claimant as well as the present contestant." * * *

"'In the case before us, the proceeding, though special in its form, is in its nature but the application of a well-known chancery remedy. It acts upon the land, and may be conclusive as to the title of a citizen of another State.'"

After quoting the language of *Pennoyer* vs. *Neff* (already reviewed), Mr. Justice Brewer considers the later cases of *Huling* vs. *Railway Co.*, 130 U. S., 559, 9 Sup.

Ct. Rep., 605, and *Mellen* vs. *Iron Works*, 131 U. S., 352, 9 Sup. Ct. Rep., 781. Distinguishing *Hart* vs. *Sansom*, 110 U. S., 151, 3 Sup. Ct. Rep., 586, he points out that in that case the decree was

> "only a decree removing the cloud created by his pretended claim of title; and therefore, according to the ordinary and undisputed rule in equity, was not a judgment *in rem*, establishing against him a title in the land. But the power of the State, by appropriate legislation, to give a greater effect to such decree, was distinctly recognized. * * * It was not the intention of the court to overthrow that series of earlier authorities, heretofore referred to, which affirm the power of the State, by suitable statutory proceedings, to determine the titles to real estate within its limits as against a non-resident defendant, notified only by publication."

This case of *Arndt* vs. *Griggs* has been uniformly followed in the United States Supreme Court, and the rule in that court is settled that by a proceeding either strictly *in rem*, or substantially *in rem*, a State may adjudicate and settle the title to land within its limits and make that adjudication binding upon all persons claiming any interest therein. See

Dick vs. *Foraker*, 155 U. S., 404;

Lynch vs. *Murphy*, 161 U. S., 247; 16 Sup. Ct. Rep., 523;

Hamilton vs. *Brown*, 161 U. S., 256;

Huling vs. *Kaw Valley R. R. Co.*, 130 U. S., 559; 9 Sup. Ct. Rep., 603;

Mellen vs. *Iron Works*, 131 U. S., 352; 9 Sup. Ct. Rep., 781;

Roller vs. *Holly*, 176 U. S., 398; 20 Sup. Ct. Rep., 410;

Overby vs. *Gordon*, 177 U. S., 221.

In the case last cited, *Overby* vs. *Gordon*, 177 U. S., 221, 44 Sup. Ct. Rep., 741, speaking of certain proceedings in a probate court of Georgia which were intended to bind all persons, the Court, after observing that jurisdiction is the right to weigh and decide, and must be exercised—speaking in a broad sense—in one or two methods, either *in rem* or *in personam*, says:

> "The proceedings referred to were not intended to constitute, and did not amount to, an action *in personam*. This results from the fact that they were devoid of the elements essential to an action *in personam;* and, if not proceedings purely *in rem*, they possessed so much of the characteristics thereof as not to warrant the allowance of greater efficacy than is accorded to a proceeding of that nature.
>
> "An essential characteristic, however, of a proceeding *in rem* is that there must be a *res* or subject-matter upon which the Court is to exercise its jurisdiction. In cases purely *in rem*, as in admiralty and revenue cases for the condemnation or forfeiture of specific property, a preliminary seizure of the property is necessary to the power of the Court to adjudicate at all. In other cases, where the proceedings are in form *in personam* but the Court is unable to acquire jurisdiction of the person of the defendant, by actual or constructive service of precess, the action may proceed as one *in rem* against the property of which a preliminary seizure or its equivalent has been made; or, jurisdiction may be exercised without such preliminary seizure where the relief sought is an adjudication respecting the title to or validity of alleged liens upon real estate situate within the jurisdiction of the Court. *Roller*

vs. *Holly*, 176 U. S., 398; 20 Sup. Ct. Rep., 410. To the class of cases where the proceedings are in form *in rem* may be added those connected with the grant of letters either testamentary or of administration."

In *Ormsby* vs. *Ottman*, 85 Fed., 492, a decree cancelling a trust deed to certain property situated in Nebraska on service of process on non-resident defendants by publication only was involved. The Court refers to the rule that equity in the absence of statute acts *in personam* only, and then says:

"It is equally well settled, however, that one of these United States has authority by the enactment of a statute to so enlarge the equity powers of the courts sitting within its limits as to confer upon them jurisdiction to adjudicate the titles and liens upon real estate within its borders as against non-residents who are brought into court by publication only. The exhaustive and convincing discussion of this proposition and the critical review of the authorities in the opinion of the Supreme Court delivered by Mr. Justice Brewer in *Arndt* vs. *Griggs*, 134 U. S., 316, 10 Sup. Ct., 557, have put this question at rest in this country, and left nothing further to be said upon it. Since that decision was rendered, the only question presented by a decree of the class under consideration here is: Did the State, by its legislation, confer the power upon the Court to render its decree against those who were brought into it by publication only?" * * *

"The evil which the Legislature of the State of Nebraska undertook to remedy by the statute now in hand was the insecurity and uncertainty in the titles to real estate within the borders of their State which resulted from adverse claims against it, held by those who would not press them to an adjudication. Owners of real property found that they could not sell it in the face of such claims. Pur-

chasers would not buy impending law-suits. They did not dare to improve it lest the adverse claimant should take both land and improvement. Yet, if the holders of these claims were not residents of their State, and did not see fit to sue to enforce them, the owners must suffer in silence, and the settlement and cultivation of the land and the growth of the cities in the State must be intolerably retarded. The object which the Legislature sought to attain was certainty and security in the title to real estate within the limits of the State. They intended that this statute should be a bill of peace. They undertook to provide by it a method by which any owner of land could quiet his title to it against all adverse claims, make it safe for improvements, and secure for purchase. They enacted that any person claiming title to real estate might bring an action to quiet his title against any person who claimed 'an adverse estate or interest therein.'" * * *

"The contention that a suit to quiet title and to remove the cloud of a trust deed or mortgage as against the holder of a lien is an action *in personam* and not *in rem*, and that service by publication gives no jurisdiction, which is so strenuously urged upon us in this case by counsel for the appellant, was answered by the Court in that case in this way: (*Essig* vs. *Lower*, 120 Ind., 239, 242, 246; 21 N. E., 1090).

" 'It is also argued that the decree in the action to quiet title set forth in the special finding is *in personam* and not *in rem*, and that the Court had no power to render such a decree on publication. While it may be true that such decree is not *in rem*, strictly speaking, yet it must be conceded that it fixed and settled the title to the land then in controversy, and to that extent partakes of the nature of a judgment *in rem*. But we do not deem it necessary to a decision of this case to determine whether the decree is *in personam* or *in rem*. The action was to quiet the title to the land then involved, and

to remove therefrom certain apparent liens. Section 318, Rev. St., 1881 (Section 320, Rev. St., 1894), expressly authorizes the rendition of such a decree on publication.'

"This answer received the sanction of the Supreme Court in *Arndt* vs. *Griggs*, 134 U. S., 316, 322; 10 Sup. Ct., 557, and any further discussion of that proposition in this case would be a work of supererogation.

In *Meyer* vs. *Kuhn*, 65 Fed., 705, a decree in a partition suit providing for service by publication *against persons unknown* was under review, Chief Justice Fuller, said:

"Proceedings in partition or to quiet title are not strictly proceedings *in rem*, for they are not taken directly against property, but they are regarded, so far as they affect property, as proceedings *in rem sub modo*, in respect of which, while there must be reasonable notice to the parties, personal service is not essential to jurisdiction, and constructive service may be substituted. *Arndt* vs. *Griggs*, 134 U. S., 316; 10 Sup. Ct., 557."

In *Bennett* vs. *Fenton*, 41 Fed., 283; 10 L. R. A., 500, Mr. Justice Shiras reviews at length the cases in the United States Supreme Court relating to actions substantially *in rem*, and the jurisdiction of the Court over the *res* in such actions, summarizing these cases as follows:

"In other words, if the enforcement of the decree touching the title is dependent solely upon the inherent powers of a court of chancery, it is, of necessity, a decree *in personam*, because generally equity jurisdiction is exercised *in personam*, and depends upon the control of the Court over the parties. If, however, there is statutory power given to the Court to effectuate its decree by controlling the property,

then the proceeding becomes in its nature a proceeding *in rem*, and in such case service by publication, in case of non-residents, will confer jurisdiction to deal with the property."

The opinion is most forcible, and while a portion of it has already been quoted, at the expense of repetition certain excerpts from its language are proper. Speaking of the Minnesota statute involved in that proceeding, the Court says:

"In brief, the purpose of the statute is to enable parties, whether in possession of realty, or where the same is vacant and unoccupied, to settle adverse claims thereto, and determine the ownership, and consequent right of possession, thereto. No suit can be brought under this statute without describing the particular realty in question, nor can a complaint be so framed as not to limit the litigation to the realty named in the complaint. The real object sought to be accomplished is to settle and quiet the title in the complainant, to the particular realty, and the statute provides that the decree rendered after the lapse of a specified time may have the force and effect of a deed. Practically, the decree operates on the land, and it is difficult to see why the same cannot be sustained as well as in cases wherein partition is made, or wherein condemnation is had for public purposes."

After pointing out in language already quoted, that jurisdiction *in rem* does not depend upon actual seizure, and that the filing of a bill to quiet title is as much notice and as effective a seizure as would be actual custody of the *res*, Justice Shiras says:

"It must, therefore, be true that the State has the right by appropriate enactment, in its own interest and in that of its citizens, not only to provide for the

taxation, partitioning or condemnation of realty within its borders owned by non-residents, but also for the quieting the title thus created to such realty, as against all adverse non-resident claimants. The limitation upon this power of the State is as to the mode of procedure. It has no jurisdiction over the person of the non-resident, and therefore can confer none upon its own courts. It has, however, jurisdiction over the property within its limits, and can therefore confer jurisdiction over the same upon its courts. When the State, by statute, provides a mode for quieting the title to lands, occupied or unoccupied, situated within the State, and as an incident thereto provides for giving notice by publication to non-resident claimants of the pendency of the proceeding, such legislation should be upheld, if by any fair construction of the statute it can be brought within the recognized power of the State. If, by the provisions of the statute, the decree itself settled the status of the title, and the right to possession and control of the land, without the necessity of enforcing the decree by actual control over the person of the defendant, then the suit and decree directly affect the land, and are in the nature of a proceeding *in rem*. This being so, then substitutive service is effectual against non-residents."

For other cases in the Federal Courts to the same effect, see

Porter Land, etc. Co. vs. *Baskin*, 43 Fed., 323;

Morris vs. *Graham*, 51 Fed., 53;

Morrison vs. *Marker*, 93 Fed., 692;

York Co. Sav. Bk. vs. *Abbott*, 131 Fed., 984;

Connor vs. *Tennessee, etc. Ry. Co.*, 109 Fed., 931; 54 L. R. A., 687;

Johnson vs. *Hunter*, 127 Fed., 219.

Passing now to decisions in the State courts, we are met with authorities giving the same potency to proceedings substantially *in rem* as to those strictly *in rem,* so numerous that it is difficult to effectively treat even the best of them.

The leading case in California upon this proposition is *Perkins* vs. *Wakeham,* 86 Cal., 580, in which Mr. Justice Patterson, in language already quoted in this brief, points out that

> "while a decree quieting title is not *in rem*, strictly speaking, it fixes and settles the title to real estate, and to that extent certainly partakes of the nature of a judgment *in rem.*"

This being true, the jurisdiction over the *res* authorizes a court proceeding under statutory authority, to conclusively adjudicate the title to that *res* as against even non-residents notified only by publication.

In *Quarl* vs. *Abbett*, 102 Ind., 233; 52 Am. Rep., 662, the action was one to set aside a fraudulent transfer of corporate stock, and the decree was rendered against a non-resident defendant brought into court by publication of process.

> "The appellant contends that no jurisdiction of the person of the defendants was obtained, and therefore no personal judgment could be rendered. We concur with counsel that no personal judgment can be rendered in a case where there is constructive service, but we cannot concur in the conclusion which is deduced from this proposition. It does not follow that property fraudulently transferred may not be reached and subjected to sale in an action commenced by publication. A personal judgment is one which binds the defendant, while a judgment which oper-

ates upon property is, in its essential features, a judgment *in rem*. Such a judgment creates no personal liability, but operates upon the particular property which constitutes the subject of litigation. A judgment operating solely upon property cannot be made the foundation of an action against the defendant; nevertheless it may effectively operate upon the particular property within the jurisdiction of the court. * * *

"It is a general principle that the process of the courts may reach and seize property within their jurisdiction. A man who brings property within the territorial jurisdiction of a State subjects it to the laws of that State. 'If a foreigner or citizen of another State,' says an able Court, 'send his property within a jurisdiction different from that where he resides, he impliedly submits it to the rules and regulations in force in the country where he places it. What the law protects, it has the right to regulate.' *Clark* vs. *Tarbell*, 58 N. H., 88. This general doctrine has been declared by other courts, among them our own (citing cases). It is upon this general principle that our statutory provisions relative to notice by publication are founded.."

Citing numerous authorities sustaining the right to adjudicate upon the title to property where such property is situate within the territorial jurisdiction of a State, the Court continues:

"The Supreme Court of the United States, in speaking of notice by publication, says: 'Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or a lien respecting the same or to partition it among different owners, or when the public is a party, to condemn and appropriate private property for a public purpose. In other words, such service may answer in all actions which are substan-

tially proceedings *in rem.' Pennoyer* vs. *Neff*, 95 U.S., 714, 727. The issuing of the writ and the levy by the sheriff brought the property within the jurisdiction of the court. But we need not stop at this point, for the power to issue a writ, effective to seize the property, was jurisdiction. It is well settled that authority to move in a cause, even to determine that there is authority, is jurisdiction. *Lantz* vs. *Moffett*, 102 Ind., 23; *Snelson* vs. *State*, 16 Ind., 29; *Board, etc.* vs. *Markle*, 46 Ind., 96; *Rhode Island* vs. *Massachusetts*, 12 Pet., 657. There was therefore jurisdiction of the subject of the action, and the notice, under the provisions of the statute providing for notice by publication, gave jurisdiction of the person so far as necessary to determine the rights of the litigants in the particular property within the jurisdiction of the court.

"It is said by appellant's counsel, that fraud is a question of fact, and therefore that such a question cannot be tried upon constructive notice. This position is not tenable. Any question affecting the status of the specific property within the jurisdiction of the Court and the rights of the parties in the property may be tried. The purpose of notice by publication is to give the best notice practicable to non-resident defendants, and thus enable the Court to fully decide the controversy respecting property within its jurisdiction, no matter what form the question may assume."

In *Dillon* vs. *Heller*, 39 Kan., 599; 18 Pac., 693, an action was brought to quiet title to real estate as against a person non-resident in the State, served only by publication. After admitting that such service could not give jurisdiction of the person of the defendant, the Court says:

"But that does not settle this controversy. The Court below had jurisdiction of something. It had

jurisdiction of the plaintiff below, and it had jurisdiction of the subject-matter of the action. This latter proposition, however, is questioned. Jurisdiction is of two kinds: jurisdiction of the person, and jurisdiction of the property or thing in controversy; or, in other words, jurisdiction *in personam* and jurisdiction *in rem*. And jurisdiction in either case is sufficient to authorize a valid judgment to be rendered. * * * Where personal service of summons can be obtained, in such an action, the action is one *in personam* as well as *in rem;* but, where service of summons can be had only by publication, then the action is one only *in rem*. The present action is one only *in rem;* and the Court below had ample jurisdiction to hear and determine the same. For the present, we shall assume that the statutes authorizing service of summons by publication were strictly complied with in the present case, and then the only question to be considered is whether the statutes themselves are valid. Or, in other words, we think the question is this: Has the State any power, through the Legislature and the courts, or by any other means or instrumentalities, to dispose of or control property in the State belonging to non-resident owners out of the State, where such non-resident owners will not voluntarily surrender jurisdiction of their persons to the State, or to the courts of the State, and where the most urgent public policy and justice require that the State and its courts should assume jurisdiction over such property? Power of this kind has always been exercised, not only in Kansas, but in all the other states. * * * Lands of non-resident defendants are attached and sold to pay their debts; and, indeed, almost any kind of action may be instituted and maintained against non-residents to the extent of any interest in property which they may have in Kansas; and the jurisdiction to hear and determine, in this kind of cases, may be obtained wholly and entirely by publication (citing cases). All the states, by

proper statutes, authorize actions against non-residents, and service of summons therein by publication only, or service in some other form no better; and, in the nature of things, such must be done in every jurisdiction, in order that full and complete justice may be done, where some of the parties are non-residents. We think a sovereign State has the power to do just such a thing. * * *

"In the present case, the plaintiff resides within the State of Kansas, and he virtually surrendered jurisdiction of himself to the Court below when he commenced this action. *He is in the actual possession of the property in controversy, and, being in the actual possession thereof, he also, in effect, surrendered jurisdiction thereof to the Court when he brought his action, and as much jurisdiction thereof as any Court in any action could obtain by virtue of a seizure of the property by its own officers;* and service of summons by publication, as authorized by law, was afterwards had in this case; and this gave the Court the power to hear and determine the case, and to render a judgment therein, and to enforce such judgment; and this is all that is necessary to give complete and absolute jurisdiction over the thing in controversy. Jurisdiction is simply the power to hear and determine, and to enforce the judgment, order, or decree made or rendered on such hearing. Nothing can be lacking in the present case. The Court had the power to hear and determine the case, the power to render the judgment prayed for; which was to quiet the plaintiff's title and possession; and he was in the actual possession of the property and as the property was and is within the territorial jurisdiction of the Court, there would seem to be no good reason why the judgment is not valid, and why the Court cannot enforce such judgment. * * * We think the Court below had ample jurisdiction in the present case. We think a court may in any case, where the statute authorizes the same, obtain juris-

diction upon service by publication concerning anything present and existing within the boundaries of the State. To hold otherwise would unsettle and overturn a great many titles to land in this State—titles which have long been acquiesced in, and supposed to be good and valid, and to be settled and established by the statutes and by numerous judicial decisions. And to hold otherwise would also do great injustice to innocent purchasers of land who hold the same under such titles. We think such titles are good."

In *Lane* vs. *Innes*, 43 Minn., 137; 45 N. W., 4, an action was brought by an assignee in bankruptcy to set aside fraudulent conveyances of property within the State. Referring to a federal statute similar to that under which that action was brought, the Court said of proceedings under it:

> "The object is to remove the obstruction, or uncover the property, so that it may be disposed of at the best price, and the proceeds appropriated to the satisfaction of the demands of creditors. That is substantially the nature of the action brought by the assignee against this plaintiff. * * * The action was not then an action *in personam*, but must be classed with actions *in rem*. The judgment sought to be recovered therein affects the land only, and it was an action where service by publication upon the non-resident defendant was proper, and one which falls within the provisions of subdivision 5, Sec. 64, c. 66, Gen. St. *Pennoyer* vs. *Neff*, 95 U. S., 733. See *Bennett* vs. *Fenton*, 41 Fed. Rep., 283."

Shepherd vs. *Ware*, 46 Minn., 174; 48 N. W., 773; 24 Am. St. Rep., 212, involved an action under a Minnesota statute authorizing suits to quiet title against persons *known and unknown*. It being claimed that there was

not due process of law, the claim was met by the Court in the following language:

> "It is conceded that constructive or substituted service may be authorized by the State, and resorted to in all actions or proceedings touching real property, which are properly denominated actions or proceedings '*in rem.*' Such are actions to partition real estate, proceedings to enforce the collection of taxes against lands, and for the condemnation of land. *Pennoyer* vs. *Neff*, 95 U. S., 727. Actions *quia timet* in respect to land, to remove a cloud, or to determine adverse claims, are equitable in their nature, and, strictly speaking, equity acts upon the person and not upon property; and in these actions the judgment affects the claim or title to the land, and they are not strictly actions *in rem*, but they concern real estate lying within the jurisdiction of the Court. And the State may clothe the Court with full power to inquire and adjudicate as to its status, title and ownership, and it is now well settled that, as respects the procedure provided and the constructive service of notice by publication upon non-resident defendants, at least, actions of this kind are to be classed with actions *in rem*. *Arndt* vs. *Griggs*, 134 U. S., 322-326, 10 Sup. Ct. Rep., 557; *Lane* vs. *Innes*, 43 Minn., 137, 45 N. W. Rep., 4.
>
> "The question is not what a court of equity, under its general powers as such, may do, but what the State may authorize in actions to adjudicate the title to real estate. Thus it is said in *Boswell's Lessee* vs. *Otis*, 9 How., 348, 350: 'It is immaterial whether the proceedings against the property be by attachment or by bill in chancery. It must be substantially a proceeding *in rem*. A bill for the specific execution of a contract to convey real estate is not strictly a proceeding *in rem*, in ordinary cases, but when such a proceeding is authorized by statute, on publication, without personal service of process, it is substantially of that character. 'And the inquiry should be, have the requisites of the statute been

complied with, so as to subject the property in controversy to the judgment of the court, and is such judgment limited to the property named in the bill?' The judgment can affect the property only, and the defendant is not personally bound beyond it. And such, in substance, is the character of this action. Its object is an adjudication of the state of the title, and the judgment goes no further. And by the procedure under consideration, the proceedings are instituted by filing the complaint, and recording the *lis pendens* against the property, and followed by the publication provided for."

In *State* vs. *Westfall*, 85 Minn., 437; 89 N. W., 175, the statute authorizing suits *against persons known and unknown* was again involved. In so far as the case deals with the particular right to bar unknown owners by publication of process, it will meet with consideration hereafter. Its force in this connection lies in its holding that a proceeding practically the same as that provided for in the statute now under discussion, is a proceeding substantially *in rem*.

"It is now the settled doctrine of this Court that the district courts of this State may be clothed with full power to inquire into and conclusively adjudicate the state of the title of all land within their respective jurisdictions, after actual notice to all of the known claimants within the jurisdiction of the Court, and constructive notice by publication of the summons to all other persons or parties, whether known or unknown, having or appearing to have some interest in or claim thereto. The proceeding provided for by the act in question is such a one. It is substantially one *in rem*, the subject-matter of which is the state of the title of land within the jurisdiction of the Court, and the provisions of the act for the serving the summons and giving notice of the

pendency of the proceedings are full and complete, and satisfy both the State and Federal constitutions. To hold otherwise would be to hold that the courts of this State cannot in any manner acquire jurisdiction to clear and quiet the title to real estate by a decree binding all interests and all persons or parties, known or unknown, for the provisions of this act are as full and complete as to giving notice to all interested parties as it is reasonably possible to make them. That the courts of this State have jurisdiction to so clear and quiet title by their decrees is no longer an open question in this State. *Shepherd* vs. *Ware*, 46 Minn., 174, 48 N. W., 773, 24 Am. St. Rep., 212; *Inglee* vs. *Welles*, 53 Minn., 197, 55 N. W., 117; *McClymond* vs. *Noble* (Minn.) 87 N. W., 838. See, also, *Mayall* vs. *Mayall*, 63 Minn., 511, 65 N. W., 942, and *Mathews* vs. *Lightner* (Minn.) 88 N. W., 992."

In *Corson* vs. *Shoemaker*, 55 Minn., 386; 57 N. W., 134, the nature of a suit to reform a deed covering property within the territorial limits of the State was under examination. Publication was there sought as against a non-resident. The Court says:

"In this case, the subject of the action is real property situate within the State. In the complaint, the plaintiff does not allege, in the words of the statute, that 'the defendant has or claims a lien or interest actual or contingent' in the property, or that 'the relief demanded consists wholly or partly in excluding the defendant from any interest or lien therein,' but he alleges the facts bringing the case within the meaning and spirit of the statute. The action is not one peculiarly personal in its nature, as contended for by the defendants. The '*res*,' as the defendants are pleased to term the written instrument, is not the substantive matter of the action. * * * The real object of the action is to pass the title of the premises, the description of which was omitted from

the deed, from the defendants to the plaintiff. * * * The defendants insist that the proceeding for the reformation of a deed is one which has descended from the ancient court of chancery, and that the jurisdiction, in such cases, has neither been extended or abridged by the legislature. Now, while it may be necessary to invoke certain equitable rules or principles in an action of this kind, yet the State has provided, by statutory law, the very method or manner of procedure to determine questions affecting the title or an interest in real estate within its boundaries. * * * The subject of the action being within the State, it has the legislative power to determine the method of procedure by which the rights of parties in regard to such subject shall be determined, and equity may be called upon to assist and guide in the determination of such legal right. A man who comes into our State, and purchases real property, should be amenable to our laws respecting that property. Not that our sovereign power is so potent that it can send its process or notice into the forum of another sovereign power, and compel a party to appear here and subject himself personally to the jurisdiction of our tribunals, and bind himself, in such action as this, by a personal judgment, which is not here sought or contemplated, but that, when he voluntarily becomes the owner of real property within our jurisdiction, he must be deemed to yield to our law when the title or interest in or to that particular piece of property is in dispute, or involved in controversy, and submit to our statutory method of procedure. He is beyond any obligation to respond personally, but his property must yield to the power of our State sovereignty."

After referring to the right of a State to tax all lands within its boundaries by whomsoever owned, and to divest the title on such persons for non-payment of taxes, the opinion continues:

"Are the proceedings for the collection of taxes really any more in the nature of a proceeding *in rem* than in this action? Where is the distinction? The property is not seized until after judgment. We do not proceed directly against the land. The service of the notice to the non-resident owner is by publication, not personal. No personal judgment is rendered, nor can it be rendered against him, but the land is the primary matter or subject of the action or proceeding. Beyond the land, the judgment does not reach. It is not a general judgment, and only operates upon the specific land which has been taxed. That is the effect of a judgment in an action of this kind. It only reaches and operates upon the land described in the complaint, and is not a general judgment operating upon other property. It is true that this Court has held that a proceeding for the enforcement of the payment of taxes upon real property is a proceeding *in rem*. *Chauncey* vs. *Wass*, 35 Minn., 1, 25 N. W. Rep., 457, and 30 N. W. Rep., 826. Yet there is no actual seizure of the land by notice, attachment, or any legal process, for the purpose of bringing the property under the control of the Court. Even in attachment proceedings, confessedly operating *in rem*, there is no actual seizure of the real property by the sheriff, but a certified copy of the writ of attachment, and his return thereon, is left in the office of the register of deeds, and a copy served upon the party, if he can be found in the county, and no other act or ceremony is needed. Gen. St. 1878, c. 66, sec. 151. It is only constructive service, and no other by publication may follow in case the defendant is a non-resident. In actions of this nature, the complaint is filed with the clerk of the court, and becomes a public record; and by section 34, c. 75, same statute, a *lis pendens* is authorized to be filed in the office of the register of deeds of the county where any interest in real property affected is situate, or where such real property is involved or brought in question. Now, such a com-

plaint and *lis pendens* each describes particularly the property affected by the action, and the judgment sought affects the land only so described. If this is not an action *in rem*, it certainly is one in the nature of such an action. The land so particularly described is, by the filing of the complaint and the filing of the *lis pendens*, as effectually brought within the control of the Court as it is in attachment proceedings. Both records, together, are notice to the public of the right claimed by the plaintiff in the land and operate as effectually as notice to the defendants of the plaintiff's claim as the filing of the attachment, for the complaint would be filed in the same Court, and the attachment and *lis pendens* filed in the same register of deed's office. In such cases, the judgment rendered is based upon substituted service, and the enforcement of the judgment operates only upon property within the jurisdiction and control of the Court. In such cases, we are not compelled to soar after the infinite, nor delve after the unfathomable, in search of refined distinctions without substantial differences.

"The plaintiff does not rest his cause of action upon the inherent powers of a court of chancery, nor upon its general jurisdiction over equity causes, where it is contended such powers are exercised only *in personam*, but upon the statutory power conferred upon our courts by legislative enactments. Of the constitutional power of the legislature to do this, we have no doubts."

In *McClymond* vs. *Noble*, 84 Minn., 329; 87 N. W., 838; 87 Am. St. Rep., 354, an action was brought to determine adverse claims against persons *known and unknown*. After a review of the previous Minnesota cases, the Court held the proceeding to be one in the nature of a proceeding *in rem*, the subject-matter of which is the adjudication of the state of the title of the land within the juris-

diction of the court. The provisions of the statute for the service of the summons upon unknown claimants were, it was therefore held, constitutional and valid.

In *Lantry* vs. *Parker*, 37 Neb., 353; 55 N. W., 962, the validity of a judgment rendered on constructive service of process against a non-resident in a suit to quiet title was affirmed upon the ground that such a proceeding was, if not strictly *in rem*, at least in the nature of a proceeding *in rem*.

> "The validity of this statute, as sustaining decrees in suits to quiet title, was affirmed in *Watson* vs. *Ulbrich*, 18 Neb., 186, 24 N. W. Rep., 732. It has also been affirmed by the Supreme Court of the United States in *Arndt* vs. *Griggs*, 134 U. S., 316, 10 Sup. Ct. Rep., 557. In the latter case, and in *Perkins* vs. *Wakeham*, 86 Cal., 580, 25 Pac. Rep., 51, the jurisdiction of the courts in such cases, to proceed against non-residents upon service by publication, is based upon the power of a sovereign state to exercise jurisdiction over all property within its limits, and to adopt such reasonable legislation as will effectually enable the courts to reach out and adjudicate titles to such property."

After quoting from numerous cases, the Court continues:

> "Under sections 51 and 77 of the Code, our statutory action of ejectment may be brought against a non-resident, and service obtained by publication. These statutes are based upon the same principle as that relating to suits to quiet title. They are valid for the same reasons, and the nature of the action, when service by publication is resorted to, is, so far as this discussion is concerned, the same. In both cases they must be regarded, so far as the adjudication of title is concerned, as actions *in rem*. * * * The term 'actions *in rem*' was evidently used in

> section 17 in the same sense in which the courts have said that suits to quiet title upon constructive service are actions *in rem.*"

In *Sloane* vs. *Martin,* 145 N. Y., 524; 40 N. E., 217, specific performance of a contract for the conveyance of real property lying within the State of New York was sought as against a non-resident, served with process by publication. It was held that such service was proper not only as against adult non-residents, but as against infant non-residents in the State. The opinion is long and not susceptible of quotation except in its entirety. It, however, distinguishes clearly between actions strictly *in personam* and those which are either strictly or substantially *in rem,* holding that, as to the latter classes, the jurisdiction of the court over the *res* authorizes it to render any decree which will directly affect that *res* on service by publication only.

In *Sloan* vs. *Thompson,* 4 Tex. Civ. App., 419; 23 S. W., 613, an action to quiet title against persons *known and unknown* was before the Court. With reference to it, it was said:

> "*It was an action for the land, and to remove clouds; but had it been only to remove clouds, it would still be an action involving title to land, cognizable in our courts, and a proceeding in rem.* Our courts have the power to settle titles to land within our State, and obtain jurisdiction for such purpose by suit for the land or involving title to the land, obtaining service upon the parties interested by publication as provided by our statutes. The law was so declared, if it had not been before, by the case of *Hardy* vs. *Beaty, supra. A State is allowed to settle titles to lands within its territory, even*

against non-resident defendants or unknown heirs, and the State has the right to prescribe the procedure and methods by which such results are accomplished.''

Without continuing the quotation of authorities, the following cases, in addition to those above cited, are in point on the proposition that proceedings, whether they be classed as strictly *in rem* or substantially *in rem*, rest upon the control of the Court over a *res* within its territorial jurisdiction, and are equally potent to affect the rights of all persons with respect to that *res*.

McLaughlin vs. *McCrory*, 55 Ark., 442; 18 S. W., 762;

Hanscom vs. *Hanscom*, 6 Colo. App., 97; 39 Pac., 885;

Harris vs. *Palmore*, 74 Ga., 273;

Otis vs. *De Boer*, 116 Ind., 531; 19 N. E., 317;

State vs. *Scanlon*, 2 Ind. App., 320; 28 N. E., 426, 430;

Williams vs. *Westcott*, 77 Ia., 332; 14 Am. St. Rep., 287; 42 N. W., 314;

Venable vs. *Dutch*, 37 Kan., 515; 1 Am. St. Rep., 262; 15 Pac., 520;

Wentzel vs. *Landry*, 39 La. Ann., 312; 1 So., 893;

Young vs. *Upshur*, 42 La. Ann., 362; 21 Am. St. Rep., 381;

Cousins vs. *Alworth*, 44 Minn., 505; 47 N. W., 169; 10 L. R. A., 504;

Peter vs. *Dunnells*, 5 Neb., 460;

Keene vs. *Sallenback*, 15 Neb., 200; 18 N. W., 75;

Watson vs. *Ulbrich*, 18 Neb., 186; 24 N. W., 732;

Sandiford vs. *Town of Hempstead*, 90 N. Y. Supp., 76, 79; 97 App. Div., 163;

Morrison vs. *Marker*, 93 Fed., 692;

Connor vs. *Tennessee, etc. R. R. Co.*, 109 Fed., 931; 54 L. R. A., 687;

Bernhart vs. *Brown*, 118 N. C., 700; 24 S. E., 527, 715; 36 L. R. A., 402;

American Building, etc. Association vs. *Matthews*, 13 Tex. Civ. App., 425; 35 S. W., 690;

Roller vs. *Holly*, 13 Tex. Civ. App., 636; 35 S. W., 1074;

Martin vs. *Pond*, 30 Fed., 15;

Scarborough vs. *Myrick*, 47 Neb., 794; 66 N. W., 867;

Fowler vs. *Brown*, 51 Neb., 414; 71 N. W., 54;

Pool vs. *Lamon*, 28 S. W., 363 (Texas Civ. App.).

In citing the above cases we have made no attempt to classify them according to the relief demanded in the particular cases, nor according to the parties affected by the decrees. They have been cited, not to show that the action authorized by the statute under discussion is one substantially *in rem*, for that much is conceded by counsel for appellant, and it is our claim that it is not only substantially *in rem*, but strictly *in rem*. Nor have these cases been cited at this point to show the validity of the process authorized by this statute, or the right of a State to decree as against unknown owners. These are questions we shall hereafter consider. They have been referred to and liberal quotation has been made from them to show

that the same jurisdictional fact lies at the basis of, and furnishes the power of the Court in proceedings which are either strictly or substantially *in rem*:—namely, that the *res* is within the territorial jurisdiction of the Court, and that the decree in each operates (after reasonable notice to persons interested) directly upon and only upon that *res*.

They show, we submit, that proceedings *in rem* and proceedings substantially *in rem*, *quasi in rem*, or in the nature of proceedings *in rem*, so far as relates to the *res* and the effect of the judgment upon that *res*, are upon the same footing. If a legislature can authorize a determination of the rights of certain persons by a proceeding strictly *in rem*, the same results can be reached and the same decree rendered through the medium of a proceeding substantially *in rem*. The name given to such proceedings "*substantially*" *in rem*, is a definition as well as a designation.

These cases further show, what is indeed a mere corollary of the propositions just stated, that the true line of distinction is not between proceedings strictly *in rem* and those substantially *in rem*, but between proceedings which are strictly or substantially *in rem*, and those which, on the other hand, are *in personam* merely. The distinction between *these* two classes of cases is not formal but real. In a proceeding *in personam* there is no *res* involved. The Court having jurisdiction over the subject-matter of the action and acquiring jurisdiction of the parties, renders a personal judgment against the party. In a proceeding *in rem*, however, whether strictly such or substantially such, the essential thing is juris-

diction over the *res*. The decree operates only as against the property, and in so far as it attempts to operate personally against a defendant, becomes a decree *in personam*. A decree strictly *in rem* always binds the world as parties to it, a proceeding substantially *in rem* binds such persons (whether few in number or "all persons interested") as are joined as parties and afforded reasonable notice of its pendency.

In conclusion upon this point, our position may be summarized as follows:

1. The action provided for by this statute is strictly *in rem*. True, it does not formally name the land itself as a defendant, but names as defendants "all persons claiming an interest in or to or lien upon the land." It has, however, every characteristic and all of the essentials of a proceeding strictly *in rem*. The party in possession brings the land into court. Process is actually served upon the land by the posting of a notice; it is constructively and with equal effect served upon the land by the very act of filing of the bill and by the filing of a *lis pendens*. The decree operates against the title to the land as effectively as a decree can be made so to operate. Notice is given to every person interested, wherever possible by actual and personal service of process, and in all other cases by every known means of constructive notice. The Legislature has given to the proceeding every characteristic of a proceeding *in rem* (omitting only the non-essential and purely formal circumstance that the land is not named as a defendant), and, so far as lies within its power, has made the proceeding in form

and in effect what in terms it declares it to be, "an action *in rem* against the world."

2. Whether it be strictly *in rem* or substantially *in rem*, is, however, immaterial. The difference between the two classes of proceedings is, one which as respects the rights of parties in the *res* is a difference of mode and not of effect or jurisdiction. Whatever may be done by a proceeding strictly *in rem* may be done by a proceeding substantially *in rem*. In one, the proceeding is always against the world, in the other, those are bound who (few or many) are made parties and afforded reasonable notice of the action. In both, the presence of the *res* within the jurisdiction, and its control by the Court, furnishes the basis for the exercise of jurisdiction; in both, the decree directly affects the *res*, in the one no more than in the other.

Up to this point, then, we have endeavored to establish two propositions:

1st. That the proceeding provided for in this statute is one strictly *in rem;*

2nd. That whether it be strictly *in rem* or not it has all the efficacy, and its decree is of equal potency with any decree which could be rendered in a proceeding strictly *in rem*.

This brings us to the gist of the argument of counsel for appellant, namely, that the Legislature has no right by a decree of this nature to bar unknown owners.

We shall hereafter have occasion to show that the notice to unknown owners provided for by this statute is reasonable, and constitutes due process of law. This, however, is rather a subsidiary than a main proposition

in the argument of counsel. Their objection is not so much that the particular notice provided for in this statute is unreasonable, but that a legislature has no power to reach unknown persons in a proceeding to confirm or quiet the title to land. It is to this proposition that we shall now reply.

VII.

PROCEEDINGS TO DETERMINE THE RIGHTS OF UNKNOWN CLAIMANTS ARE CONSTITUTIONAL, AND THE RIGHTS OF SUCH CLAIMANTS MAY BE FORECLOSED IN PROCEEDINGS EITHER STRICTLY OR SUBSTANTIALLY IN REM.

If the proceeding prescribed by the statute is one strictly *in rem*, and it be within the power of a State to prescribe a proceeding of that nature to determine the title to real property within its borders, it is, we think, practically conceded by counsel for appellant that the judgment of the Superior Court which is here assailed is valid and conclusive.

If then we have succeeded in showing the proceeding to be one which is strictly *in rem* and permissible as such, there is an end to the discussion.

The validity of the statute need not, however, be rested upon a decision of that question. The right of a legislature to provide for the determination of the rights of unknown claimants in suits to quiet title and in analogous proceedings has been too long recognized and too often judicially determined to be longer the subject of serious controversy. Such statutes exist in practically every

State of the Union, and have been uniformly upheld wherever their validity has been brought into question.

In disputing the conclusive effect of the decree here attacked, as against unknown claimants, counsel for appellant, disregarding for the most part the numerous cases which affirm the right of a State to bind such claimants in proceedings substantially *in rem*, urge the following contentions:

First. That no reasonable notice can be imparted by any process in which the parties defendant are not described by their proper names, but are designated by general description.

Second. That constructive service of process upon unknown claimants is not permissible in a suit to quiet title; and

Third. That the proceeding prescribed is entirely outside the realm of judicial cognizance as a mere attempt to secure a "declaration of rights" upon an "*ex parte*" application.

The reasonableness of the notice afforded unknown claimants by the act is discussed under a subsequent heading of this brief. The main objection, however, urged by counsel for appellant to the reasonableness of the notice is the fact that unknown claimants are (necessarily, of course,) sued by general designation and not by name. This contention obviously falls at once with the establishment of the proposition that suits against unknown claimants are permissible at all. In the nature of things *unknown* claimants can be described only by general designation.

The suggestion that the proceedings prescribed by the statute are entirely outside the realm of judicial power because directed against claims, which being undisclosed and possibly non-existent, cannot be alleged in the complaint as certainly infringing any right of the plaintiff, likewise receives full consideration hereafter. To the elaboration of this contention is devoted the larger part of appellant's brief. Apart from its entire (and we believe obvious) lack of substance, this suggestion, like the one last considered, practically falls with the establishment of the validity of proceedings against unknown claimants in general. It is apparent that in every case where the rights of unknown claimants are made the subject of judicial proceedings, the same elements are present as are here made the basis of this suggestion. The numerous authorities which sustain the validity of such proceedings dispose at the same time of the suggestion that they are non-judicial in character.

We pass then to a consideration of the cases which declare the right of the State in providing for the adjudication and settlement of title to land within its boundaries, to determine in such proceedings the rights of unknown claimants, sued as such and afforded reasonable notice of the pendency of the proceedings.

In dealing with the authorities which show the nature of the power exercised by courts in proceedings substantially *in rem*, cases in numbers have already been cited which sustain the validity of such proceedings as against non-resident defendants, beyond the reach of the process of the Court, and afforded notice of the proceedings only by publication or similar *media* of cita-

tion. The same doctrine has, in some of the cases already reviewed, been shown to be equally applicable to judgments concluding the rights of unknown claimants. These are hereafter reviewed, but it is plain that the power to bind the rights of non-residents, upon reasonable constructive notice, rests upon a principle broader than the mere application of it. That principle is declaratory of the power of a State, inherent in sovereignty, to provide for the determination and settlement of the title to property within its borders upon reasonable notice to those who, whether, because of non-residence or because unknown, cannot be reached by the process of its courts.

In *Title, etc. Restoration Co.* vs. *Kerrigan,* 150 Cal., 289, 313, Mr. Justice Sloss says:

> "Applying the principles which have led the courts in cases like *Arndt* vs. *Griggs,* 134 U. S., 316, (10 Sup. Ct., 557), and *Perkins* vs. *Wakeham,* 86 Cal., 580 (21 Am. St. Rep., 67, 25 Pac., 51), to sustain judgments quieting titles against non-residents upon substituted service, why should not the Legislature have power to give similar effect to such judgments against unknown claimants where the notice is reasonably full and complete? *The validity of such judgments against known non-residents is based upon the ground that the State has power to provide for the determination of titles to real estate within its borders and that as against non-resident defendants or others who cannot be served in the State, a substituted service is permissible as being the only service possible. These grounds apply with equal force to unknown claimants.* The power of the State as to titles should not be limited to settling them as against persons named. In order to exer-

cise this power to its fullest extent it is necessary that it should be made to operate on all interests known and unknown."

The opinion then quotes the language of Holmes, C. J., in *Tyler* vs. *Judges of the Court of Registration*, 175 Mass., 71 (55 N. E., 812), voicing on this matter the views of the majority of the Court):

> "'If it does not satisfy the constitution, a judicial proceeding to clear titles against all the world hardly is possible; for the very meaning of such a proceeding is to get rid of unknown as well as known claimants—indeed, certainly against the unknown may be said to be its chief end—and unknown claims cannot be dealt with by personal service upon the claimant.'"

In that case, Mr. Justice Holmes, speaking for the Court, continues:

> "It seems to have been the impression of the Supreme Court of Ohio, in the case most relied upon by the petitioner, that such a judicial proceeding is impossible in this country. *State* vs. *Guilbert*, 56 Ohio St., 575, 629. But we cannot bring ourselves to doubt that the Constitutions of the United States and of Massachusetts at least permit it as fully as did the common law. Prescription or a statute of limitations may give a title good against the world and destroy all manner of outstanding claims without any notice or judicial proceeding at all. Time and the chance which it gives the owner to find out that he is in danger of losing rights are due process of law in that case. * * * The same result used to follow upon proceedings which, looked at apart from history, may be regarded as standing half way between statutes of limitations and true judgments *in rem*, and which took much less trouble about giving notice than the statute before us."

In *Title, etc. Restoration Co.* vs. *Kerrigan,* 150 Cal., 289, 314, Mr. Justice Sloss points out that proceedings not strictly *in rem,* but intended to have the effect of barring unknown claimants who are brought in only by publication, or other substituted service, are not entirely new in the legislation of California. Leaving out of consideration proceedings for the probating of wills, for distribution of estates, escheats, tax cases and proceedings to determine heirship,

> "all of which are claimed by respondent to be distinguishable from the case at bar in that, as claimed, they are proceedings strictly *in rem,*"

the court refers to the statutes permitting the determination of adverse claims to real property as against known defendants, and

> " 'all other persons unknown, claiming any right, title, estate, lien or interest in the real property described in the complaint adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto.' "

The opinion continues:

> "That the State may confer upon its courts jurisdiction to declare title to real property within the State, to be vested in the plaintiff as against other claimants, known or unknown, upon substituted service, has been held by the courts of several states in well-considered cases."

In addition to the California statutes mentioned in that opinion providing for proceedings binding the rights of unknown claimants are prominently those which make such provision in proceedings for partition (C. C. P., Secs. 753, 756, 757, 759, 763, 764, 766, 780, 788, 792, *et seq*).

Nor are proceedings against unknown claimants peculiar to California.

In the majority opinion in *Tyler* vs. *Court of Registration*, 175 Mass., 71; 55 N. E., 812, Mr. Justice Holmes makes reference to a list of statutes compiled (a decade since) by the Attorney General of the State of Massachusetts. That compilation shows that provision for summoning unknown parties by general description and for adjudicating their claims to land within the jurisdiction then existed in 39 States of the Union and that statutory provision had been made for reaching the claims of unknown persons,

In partition suits by 23 states.

In bills in equity under general equity jurisdiction by 7 states.

In escheat proceedings by 9 states.

In suits to restore lost records or documents by 2 states.

In suits to declare perfect, or quiet title to land in the jurisdiction by 10 states.

In suits to assign or discharge dower by 2 states.

In suits to establish boundaries by 2 states.

In suits to confirm tax title by 1 state.

In suits to determine extent of incumbrance to land in the jurisdiction by 1 state.

In suits to remove incumbrance on title to land in the jurisdiction by 4 states.

Any investigation of the authorities dealing with suits against unknown claimants shows that this compilation was by no means complete. Suits to confirm tax titles, for instance, concluding the rights of unknown owners

exist in not *one* but many States, and have been repeatedly discussed in reported cases.

The validity of proceedings to bind unknown claimants is not, however, a matter of assumption dependent even upon the long recognition of such proceedings nor the number of jurisdictions in which they have existed for years without suggestion of their invalidity. They have been upheld in numerous cases. The few cases (hereinafter considered) in which even a doubt of their validity or a suggestion of their invalidity is contained, offer but *dicta* upon this point and the statute involved, if held unconstitutional, was in each instance annulled upon other and satisfactory grounds. The overwhelming weight of judicial authority and (using the term strictly) *all* judicial *authority* sustains and establishes the validity of such proceedings.

Of these cases, two,

Title, etc. Restoration Co. vs. *Kerrigan*, 150 Cal., 289, and

Tyler vs. *Judges of Court of Registration*, 175 Mass., 71; 55 N. E., 812,

have already been so frequently cited in this brief as to make a review of them at this point unnecessary. The first upholds as valid the statute here under discussion, and was reaffirmed in *Hoffman* vs. *Superior Court*, 151 Cal., 386, the second sustains the validity of the Massachusetts Torrens Act, affording substantially the same relief.

In *Robinson* vs. *Kerrigan*, 151 Cal., 40, the Supreme Court of California had before it the Torrens Law of

that State, which (like the Torrens Acts in other jurisdictions, and the statute here under discussion) provides for a determination of the rights of all persons, known or unknown, in land situate within the State. Mr. Justice Shaw delivering the opinion of the Court, after reaffirming the opinion rendered in *Title, Etc. Restoration Co.* vs. *Kerrigan,* said:

> "Similar laws have been enacted in Ilinois, Minnesota and Massachusetts. These laws were attacked in the supreme courts of those States on similar constitutional grounds, and have been declared valid. These decisions fully support the conclusion that the act in question does not deprive persons of property without due process of law, nor withhold from them the equal protection of law. *People* vs. *Simon,* 176 Ill., 165 (68 Am. St. Rep., 175, 52 N. E., 910); *State* vs. *Westfall,* 85 Minn., 437 (89 Am. St. Rep., 571, 89 N. W., 175); *Tyler* vs. *Judges,* 175 Mass., 71 (55 N. E., 812).
>
> 'The State has full control over the subject of the mode of transferring and establishing titles to property within its limits. For these purposes the State has power to provide a special proceeding, in the nature of a proceeding *in rem,* to fix the *status* of the land and declare the nature of the titles and interests therein and the person or persons in whom such titles and interests are at the time vested. It may do this whenever it may be considered necessary or likely to promote the general welfare. *Arndt* vs. *Griggs,* 134 U. S., 321 (10 Sup. Ct., 557); *People* vs. *Simon,* 176 Ill., 165 (68 Am. St. Rep., 175, 52 N. E., 910); *Hamilton* vs. *Brown,* 161 U. S., 256 (16 Sup. Ct., 585)."

We shall have occasion hereafter to consider the decisions in which the Torrens Acts of various States have been upheld. In addition to those cited in the opinion

of Mr. Justice Shaw, the Supreme Court of Colorado has (since the rendition of that opinion) sustained the Torrens Law of Colorado. The frequent decisions upholding similar acts would seem to have been there treated by Court and counsel as placing beyond doubt their validity and conclusive effect as against all persons, known or unknown. It does not appear to have been even contended that the act in this particular did not afford due process at law.

People ex rel. Smith vs. *Chrissman* (Colo.), 92 Pac., 949.

We pass now to a consideration of the authorities showing that

> "In proceedings concerning realty, persons designated as 'unknown owners' and who are personally served, or who are served by publication and whose connection with the land is such that they are bound to take notice of the proceedings, will be concluded by the judgment" (citing cases).
>
> 23 Cyc., 1241.

Shepherd vs. *Ware,* 46 Minn., 174; 48 N. W., 773; 24 Am. St. Rep., 212, is one of the leading cases upon the right of a State to bar unknown owners in suits to determine adverse claims. In that case it appeared that an action had been brought to quiet title against "Benjamin Homan and all other persons or parties unknown claiming any right, title or interest in the real property described in the complaint on file in the action, and their unknown heirs." Summons was served by publication. In an action of ejectment the judgment rendered in the

suit to quiet title against unknown persons was offered in evidence as against the defendant Ware. The Court says:

> "It being conceded that the statute in question providing for this mode of service upon unknown claimants, in the manner therein provided, was complied with, the only question to determine is whether the act in question is constitutional. The defendant claims that the procedure is not due process of law, and that the judgment is void. The question, then, is whether the legislature has the power, in actions to determine adverse claims to real property, to authorize proceedings by action against unknown claimants, and bind them by constructive notice thereof. It is conceded that constructive or substituted service may be authorized by the State, and resorted to in all actions or proceedings touching real property, which are properly denominated actions or proceedings '*in rem.*' Such are actions to partition real estate, proceedings to enforce the collection of taxes against lands, and for the condemnation of land. *Pennoyer* vs. *Neff*, 95 U. S., 727. Actions *quia timet* in respect to land, to remove a cloud, or to determine adverse claims, are equitable in their nature, and, strictly speaking, equity acts upon the person and not upon property; and in these actions the judgment affects the claim or title to the land, and they are not strictly actions *in rem*, but they concern real estate lying within the jurisdiction of the Court. And the State may clothe the Court with full power to inquire and adjudicate as to its status, title, and ownership, and it is now well settled that, as respects the procedure provided, and the constructive service of notice by publication upon non-resident defendants, at least, actions of this kind are to be classed with actions *in rem*. *Arndt* vs. *Griggs*, 134 U. S., 322-326, 10 Sup. Ct. Rep. 557; *Lane* vs. *Innes*, 43 Minn., 137, 45 N. W. Rep., 4."

The Court then observes that the question is not as to the inherent powers of a court of equity, but "what the State may authorize in actions to adjudicate the title to real estate." After quoting from *Boswell's Lessee* vs. *Otis*, 9 How., 348, 350, to the effect that if the action be substantially a proceeding *in rem*, it is immaterial whether it proceed against the property by attachment or by bill in chancery, the opinion continues as follows:

> "The judgment can affect the property only, and the defendant is not personally bound beyond it. And such in substance, is the character of this action. Its object is an adjudication of the state of the title, and the judgment goes no further. And by the procedure under consideration, the proceedings are instituted by filing the complaint, and recording the *lis pendens* against the property, and followed by the publication provided for. * * *
>
> "It is a case, then, where constructive or substituted service of notice upon adverse claimants may be made. Under the constitution, legal proceedings in the courts are under the direction of the legislature, subject, of course, to the fundamental provisions of the bill of rights. But the guaranty of 'due process of law' does not necessarily require personal service of notice upon parties resident or non-resident. The legislature may, in its discretion, provide for substituted service in case of necessity, or where personal notice is for any reason impracticable, in an action where the controversy relates to property which is within the jurisdiction of the Court, and with a reasonable exercise of such legislative discretion the courts will not assume to interfere. Thus attachments are allowed against the property of absconding or concealed debtors within the State, and judgments rendered and their property sold after notice by publication. Other familiar examples might be cited. 'The right of the legislature to make such provision, in proper cases, has never been

doubted, but has long been recognized and acted on.' Cooley, Const. Lim., star page 404; *In re Empire City Bank*, 18 N. Y., 215; *Burnam* vs. *Com.*, 1 Duv., 210. *Clearly within the rule stated are statutory regulations providing for the service of notice by publication upon unknown heirs and claimants in cases involving the settlement of estates or the title to lands.* As in other cases, 'where actual notice cannot be given, there must either be no remedy, or constructive notice must be substituted as sufficient, and what constructive notice shall be given is a question of legislative discretion rather than of power.' *Burnam* vs. *Com., supra.* Ordinary civil actions against known residents of the State do not fall within this rule. *Bardwell* vs. *Collins, supra.* Similar provisions are found in the statutes of several of the States, and their validity is upheld by the courts. Rev. St. Wis. 1878, secs. 1208, 2639, 3196; *Truesdell* vs. *Rhodes*, 26 Wis., 215; *Gray* vs. *Gates*, 37 Wis., 614; *Hynes* vs. *Oldham*, 3 T. B. Mon., 267. * * * The act in question here provides that, in actions to determine adverse claims, the plaintiff may include as defendants in such actions, and insert in the title thereof, in addition to the names of such persons or parties as appear of record to have, and other persons or parties who are known to have, some title, claim, estate, lien or interest in the lands in controversy, the following, viz.: 'Also all other persons or parties unknown, claiming any right, title, estate, lien or interest in the real estate described in the complaint herein.' And service of the summons may be had upon all such unknown persons or parties defendant, by publication, as provided by law in case of non-resident defendants. The statute further provides that such unknown defendants should have the same rights as defendants named, who are served by publication; that is to say, the same right to appear and defend, before and after judgment. The provisions of a statute, upon a subject of so great importance, might well have been

more complete and definite as respects the procedure to be followed; but this was a matter fairly within the legislative discretion, and the statute is operative and sufficient to authorize the constructive service by publication upon claimants or interested parties who are in fact unknown. * * * We think the statutory provisions are sufficient for the purposes intended, and, as they were complied with in this case, we must assume that the Court had jurisdiction, and the judgment in question was valid."

In *McClymond* vs. *Noble*, 84 Minn., 329; 87 N. W., 838; 87 Am. St., 354, the statute considered in *Shepherd* vs. *Ware, supra*, was held applicable alike to unknown claimants who were residents of the State, and to those who were non-residents.

"Nor did the fact that the defendant was a resident of the State when the action was begun, and that the summons was served only by publication affect the jurisdiction of the Court over the land, and its power to award the judgment in question. This question was exhaustively considered in the case of *Shepherd* vs. *Ware*, 46 Minn., 174, 24 Am. St. Rep., 212, 48 N. W., 773, and decided adversely to the contention of the defendant. This Court held in that case, distinguishing *Bardwell* vs. *Collins*, 44 Minn., 97, 20 Am. St. Rep., 547, 46 N. W., 315, that the action authorized by the General Statutes of 1894, Section 5818, is in the nature of a proceeding *in rem*, the subject-matter of which is the adjudication of the State of the title of the land within the jurisdiction of the Court. *Therefore, the provisions of the statute for the service of the summons upon unknown claimants were constitutional and valid.* No other substantial objections to the judgment were made on the argument of the appeal, and it follows that the trial court was right in refusing to vacate it on the ground that it had no jurisdiction to enter it."

In *State ex rel. Douglas* vs. *Westfall,* 85 Minn., 437, 89 N. W., 175, the validity of the Torrens Act of Minnesota was involved. In the course of the opinion it was said:

> "*Actions and proceedings to conclusively establish rights and titles against all claimants and parties, known and unknown, are not novelties in our jurisprudence, for decrees probating wills, distributing estates of deceased persons, quieting title to real estate against unknown heirs and unknown parties, have been repeatedly held to be conclusive on the whole world. It is now the settled doctrine of this Court that the district courts of this state may be clothed with full power to inquire into and conclusively adjudicate the state of the title of all land within their respective jurisdictions, after actual notice to all of the known claimants within the jurisdiction of the Court, and constructive notice by publication of the summons to all other persons or parties, whether known or unknown, having or appearing to have some interest in or claim thereto.*"

Addressing itself more particularly to the Minnesota statute there involved, which provided for a decree to initiate registration under the Torrens system, the Court says:

> "The proceeding provided for by the act in question is such a one. It is substantially one *in rem,* the subject-matter of which is the state of the title of land within the jurisdiction of the Court, and the provisions of the act for serving the summons and giving notice of the pendency of the proceeding are full and complete, and satisfy both the State and federal constitutions. To hold otherwise would be to hold that the courts of this State cannot in any manner acquire jurisdiction to clear and quiet the title to real estate by a decree binding all interests

and all persons or parties, known or unknown, for the provisions of this act are as full and complete as to giving notice to all interested parties as it is reasonably possible to make them. That the courts of this State have jurisdiction to so clear and quiet title by their decrees is no longer an open question in this State. *Shepherd* vs. *Ware*, 46 Minn., 174, 48 N. W., 773, 24 Am. St. Rep., 212; *Inglee* vs. *Welles*, 53 Minn., 197, 55 N. W., 117; *McClymond* vs. *Noble*, (Minn.), 87 N. W., 838. See, also, *Mayall* vs. *Mayall*, 63 Minn., 511, 65 N. W., 942; and *Mathews* vs. *Lightner* (Minn.), 88 N. W., 992."

In *Hardy* vs. *Beaty*, 84 Texas, 562, 19 S. W., 778, 31 Am. St. Rep., 80, in an action brought against the "unknown heirs of F. H. Alley," certain parties intervened, claiming title to the land under a prior judgment "against the heirs of Joseph Wilson." The Court says:

"These provisions of the statutes are so well known that we deem it unnecessary to quote them. They show the purpose of the law to be to provide by the remedy of trespass to try title a method of vesting and divesting the title to real estate in all cases where the right or title or interest and possession of land may be involved. The remedy was evidently designedly intended as broad enough and effective in its scope to embrace all character of litigation that affected the title to real estate. This being the purpose of the law we think the remedy pursued by Outler was an adjudication of the title between him and the heirs of Wilson, and fell within the provisions of the law that authorized the action of trespass to try title. This being true, it is next to consider whether such an action is one *in rem*. Our opinion upon this question cannot be more satisfactorily expressed than by what is said by the Supreme Court of the United States in the case of *Arndt* vs. *Griggs*, 10 Sup. Ct. Rep., 558, 134 U. S., 316."

The opinion then quotes at length from the case referred to, to the point that every State has the right to adjudicate the title to property within its limits as against all persons resident or non-resident.

> "Entertaining these views, we hold that the remedy was *in rem*, and that the Court had jurisdiction to render the judgment so far as it affected the title to the lands."

and this, though the unknown heirs involved were non-residents of the State in which the decree was rendered.

In *Belcher* vs. *Mhoon*, 47 Miss., 613, a statute permitted the holder of a tax title to have his title perfected as against all persons who had or claimed any interest at the time of the tax sale. Under the statute an appeal was filed in the chancery court. Thirty days' notice was then given by posting upon a court-house door and by publication in a newspaper in the county, calling upon "all persons claiming or having any interest, either legal or equitable, in said lands at the time the same were sold for taxes, and all such other persons as may be interested therein," to appear and show cause why the claimant's title should not be perfected. In terms the statute made the decree binding upon all persons known or unknown. The statute was held constitutional, the Court saying:

> "The bill might well be classified under that head of equity jurisprudence called *quia timet*, extended by the statute much further, however, but resting on that principle. The policy of the statute is to adjudicate upon the validity of the title, not to disturb possession. We think that it is a legitimate exercise of legislative power and discretion."

In *Sloan* vs. *Thompson*, 4 Tex. Civ. App., 419; 23 S. W., 613, in an action of trespass to try title, the lower court admitted in evidence a judgment entered in a prior action entitled *Prather* vs. *Heirs of David Sloan*. It being contended that the Court erred in receiving this judgment as evidence, Collard, J., said (in language already quoted):

> "It was an action for the land and to remove clouds; but had it been only to remove clouds it would still be an action involving title to land, cognizable in our courts, and a proceeding *in rem*. Our courts have the power to settle titles to land within our State, and obtain jurisdiction for such purpose by suit for the land or involving title to the land, obtaining service upon the parties interested by publication as provided by our statutes. The law was so declared, if it had not been before, by the case of *Hardy* vs. *Beaty*, *supra*. A State is allowed to settle titles to lands within its territory, even against non-resident defendants or unknown heirs, and the State has the right to prescribe the procedure and methods by which such results are accomplished."

One of the most frequent instances, and probably the most frequent instance, of suits against unknown claimants, are those where the joinder of such persons as parties defendant is required or permitted in suits for partition.

> 30 Cyc., 206, citing authorities in various jurisdictions involving partition suits against unknown owners.

In *Mason* vs. *Messenger*, 17 Ia., 261, the validity of a judgment rendered on constructive notice against unknown owners in partition proceedings was involved. In dealing with the contention that this did not involve due

process of law, the opinion enters into an instructive and interesting discussion of the history of constructive service of process. After upholding the right of the Legislature to provide a constructive notice in such cases, the Court says:

> "Without the power thus to legislate and adjudicate, it would be in the power of non-residents and unknown persons to secure an endless credit, to avoid the payment of their just debts and to hold the rights of citizens in real property owned jointly with them practically forever in abeyance."

In *Sullivant* vs. *Weaver*, 10 Ohio, 275, a statute authorized proceedings against the heirs of deceased persons, without naming them, where their names were unknown. Upholding a decree rendered under this statute, the Court said:

> "We suppose it to be within the legitimate scope of legislative power to direct the forms of process, and the system of proceeding, by which lands lying within its jurisdiction are to be affected; and it seems a convenient and necessary exercise of this power to devise the means of adjudicating the titles to land here where owners are abroad or unknown."

People vs. *Simon*, 176 Ill., 165, 52 N. E., 910, 44 L. R. A., 801, is a case in which the Torrens Act of Illinois was upheld. Answering the contention that a substituted service on a resident defendant was not due process of law, the Court says:

> "While a substituted service is permitted in some instances particularly in cases of non-residents this is because of the necessities of the case. The act does contemplate, in some contingencies, at least, actual personal service, *and the general law pro-*

vides for publication as to unknown owners and persons in interest and non-residents. An applicant may proceed in this way, and in strict accordance with the act obtain a decree or finding as to his title *which will be binding beyond all question,* so that, even if the proper construction of the provision were that it attempted to authorize judgment against a resident notified only by publication, yet the law can be given practical effect, in which event only the particular provision would fail, and not the whole law."

In *Hamilton* vs. *Brown,* 161 U. S., 256, the validity of a judgment in proceedings to establish an escheat, which was rendered as against unknown heirs, notified only by the publication of a notice to "all persons interested in the estate of Walter Hamilton" was under examination. The Court said:

"The judgment is conclusive evidence of the State's title in the land, not only against any tenants or claimants having actual notice by *scire facias,* or having appeared and pleaded, but also against all other persons interested in the estate, and having had constructive notice by publication." * * *

"As to personal property, indeed, a judgment *in rem,* after notice by publication only, might not bind persons who had no actual notice of the proceedings, unless the thing had been first seized into the custody of the Court. *The Mary,* 9 Cranch, 126, 144; *Scott* vs. *McNeal,* 154 U. S., 34, 46, 14 Sup. Ct., 1108; *Hilton* vs. *Guyot,* 159 U. S., 113, 167, 16 Sup. Ct., 139. *But it was within the power of the Legislature of Texas to provide for determining and quieting the title to real estate within the limits of the State and within the jurisdiction of the Court, after actual notice to all known claimants, and notice by publication to all other persons. Phillips* vs. *Moore,* 100 U. S., 208, 212; *Arndt* vs. *Griggs,* 134 U. S., 316, 10

Sup. Ct., 557; *Hardy* vs. *Beaty*, 84 Tex., 562, 569, 19 S. W., 778.

"When a man dies, the Legislature is under no constitutional obligation to leave the title to his property, real or personal, in abeyance for an indefinite period; but it may provide for promptly ascertaining, by appropriate judicial proceedings, who has succeeded to his estate. If such proceedings are had, after actual notice by service of summons to all known claimants, and constructive notice by publication to all possible claimants who are unknown, the final determination of the right of succession, either among private persons, as in the ordinary administration of estates, or between all persons and the State, as by inquest of office or similar process to determine whether the estate has escheated to the public, is due process of law."

The quotation from cases which have affirmed the validity of decrees against unknown claimants might be continued almost indefinitely. Those which have been made are, however, we think, sufficient to establish the uniformity of recognition accorded the right of a State to decree as against persons unknown. An excellent collection of the cases relating to proceedings against unknown owners, showing not only the uniformity with which such proceedings have been upheld as constitutional, but as well the number of jurisdictions in which statutes authorizing such proceedings are in force, and the number of cases in which they have been applied, will be found in 87 American State Reports, pages 358 to 368, appended to the case of *McClymond* vs. *Noble*, 84 Minn., 329.

There is, we submit, no better evidence of the validity of the provisions contemplating the adjudication of rights

of unknown claimants than the length of time that such provisions have existed upon the statute books of the various States without question of their constitutionality, and the number of instances in which their provisions have met with the sanction of judicial enforcement.

As already noted, provisions of this nature exist in at least 39 and probably in all of the States. It is impossible for us to consider at any length each of the cases in which such statutes have been upheld or enforced; their number forbids it. We here append, however, a list by no means exhaustive, of cases not already cited in which statutes of this nature have been involved, their constitutionality vindicated or recognized, and their provisions enforced.

In some, it will be noted, the provisions construed or considered permitted the successors of a given person to be sued merely as the "unknown heirs" of such person. In others, almost equally numerous, the statutes involved (like that here under discussion) provide for a joinder by general designation of "all persons unknown" claiming any interest in the land involved.

Hall vs. *Melvin*, 62 Ark., 439; 35 S. W., 1109, a proceeding to quiet title against unknown heirs, involving Section 5681 Sand. & H. Dig. (Ark.), permitting service against unknown heirs.

McMahan vs. *Smith*, 69 Ark., 591; 65 S. W., 459, ejectment against named parties and unknown heirs (involving the same statute).

Johnson vs. *Thomas*, 23 App. D. C., 141, decided under an act of Congress (incorporated in Section 111 of the Code of the District of Columbia), authorizing suits by

persons who have acquired title by adverse possession to establish such title as matter of record. The Section provides that:

> "If in any case it shall be unknown whether one who if living would be an adverse party is living or dead, or in case of a decedent whether he died testate or left heirs or his heirs or devisees were unknown,"

the action may proceed against such person as if living (if the fact of his death be unknown), or (if his heirs and devisees be unknown) against them, described only as heirs or devisees of such person. The Court said:

> "The proceeding authorized by this section of the Code is not merely a proceeding to quiet title as against a particular claimant; but it is practically an equitable action of ejectment to establish the right and title of the complainant as against all the world. The purpose of it is to procure and place among the land records of the District of Columbia a decree declaring a perfect title to have become vested in the complainant by adverse possession, as though the complainant had been the first grantee from the State."

Gwinn vs. *Brown*, 21 App. D. C., 295, 312, an action under the same section. The Court observes that its purpose was

> "to invest a court of equity with power and jurisdiction to make a declaratory decree as to the rights of parties who may show that they have acquired a title by adverse possession such as may be sufficient in point of law to bar all other claimants to the property, and to direct a copy of such decree to be entered of record in the office of the recorder of deeds of such district. By this means the title is

made perfect of record instead of resting *in pais* dependent upon the uncertainties of parol testimony."

Simmons vs. *Heirs of Fry*, 19 D. C., 472; specific performance against unknown heirs, involving Section 787 Revised Statutes D. C., providing for substituted service in various actions involving real estate, upon any defendant who cannot be found.

People's National Bank vs. *Cleveland*, 117 Ga., 908, 44 S. E., 20, quoting, although not involving Georgia Statute, Civil Code, Sec. 4975, permitting actions against unknown owners, *inter alia*, in suits "to remove a cloud therefrom or quiet title thereto."

Pile vs. *McBratney*, 15 Ill., 314, ejectment against unknown heirs, involving Rev. St. Illinois, Chapter 21, Secs. 41 and 42.

> "The affidavit and advertisement were sufficient to give the Court jurisdiction of the persons of the defendants. They contained all that the statutes required. The affidavits stated that the heirs of Mastin were interested in the subject-matter of the suit, and that their names were unknown to the plaintiff and that was enough to authorize them to be proceeded against as 'the unknown heirs of Carr Mastin.' * * * On the return of the summons and the publication of the notice the heirs of Mastin were as much before the Court and the Court was as much authorized to hear and determine the case as if the proceedings had been against the heirs by their proper names."

Mulvey vs. *Gibbons*, 87 Ill., 367, a proceeding under the Burnt Records Act (Rev. Stats. Illinois, 1875, page 838), against named defendants and "unknown persons."

(For other cases upholding and applying the Illinois Burnt Records Act, see

Bertrand vs. *Taylor*, 87 Ill., 235;
Heacock vs. *Lubuke*, 107 Ill., 396;
Gage vs. *Caraher*, 125 Ill., 447;
Smith vs. *Gage*, 12 Fed., 32;
Glos vs. *Mulcahy*, 210 Ill., 639; 71 N. E., 629,

and numerous cases cited in briefs and opinion in *Gage* vs. *Caraher*, *supra*). The constitutionality of this act was affirmed by the Supreme Court of the United States in *Gormley* vs. *Clark*, 134 U. S., 338, 10 Sup. Ct. Rep., 554.

Thornton vs. *Houtze*, 91 Ill., 199, involving judgment rendered in partition suit against a named party, and the "unknown heirs of Hiram Thornton."

> "To give the Court jurisdiction over the persons of unknown parties, all we think that is necessary is that it shall be made to appear there are unknown parties, and the notice required by the statute shall be published as to them."

Burton vs. *Perry*, 146 Ill., 71; 34 N. E., 60, involving a decree rendered in a suit for specific performance against the "unknown heirs and devisees of Asa W. Chambers, deceased, and the unknown heirs and devisees of Sheldon Benedict, deceased." Starr & C. Ann. St. (Ill.) page 395, authorizing publication against unknown heirs "in all suits in chancery and suits to obtain titles to lands."

> "When the facts authorize a statutory proceeding against the unknown heirs holding the apparent title, the prosecution of such a proceeding to the end, and the securement of a title thereunder, amount to a

> dealing with such heirs as the real owners, just as much as would be a purchase from heirs whose names are known. * * * The appellants, purchasing in good faith and without notice, had a right to rely upon that decree and the deed thereunder as passing Benedict's title. The Court had jurisdiction of the parties—the unknown heirs of Benedict, deceased—and of the subject-matter—the specific performance of a contract to convey land."

Dickey vs. *City of Chicago*, 152 Ill., 468; 38 N. E., 932, action for condemnation of land, referring to the same statute, but holding that decree against a named party and "unknown owners" cannot be sustained against a party *named* on the ground that he is an "unknown" owner.

Walker vs. *Ogden*, 192 Ill., 314; 61 N. E., 403, sustaining a plea of former adjudication, which showed that the rights of the plaintiff had been barred in a suit to quiet title in which she had been sued with others, under the general designation of "unknown owners." The Court says:

> "But, in the second place, counsel say that the complainant, Amanda M. Walker, was not unknown, and that there is nothing in the former appeal or decree that shows that she was one of the unknown owners who were notified by publication and against whom the bill was filed and the decree rendered. That is a question of identity. * * * The bills in this case sufficiently aver that said Amanda M. Walker was one of the persons mentioned in the plea and decree as 'unknown owners.' No issue here has been taken of this averment, and it must of course be taken as true. It follows necessarily that the complainant is barred and estopped by the former decree

> from claiming any right or title to the lot in question, and it was correctly so held by the chancellor below."

Unknown Heirs vs. *Kimball*, 4 Ind., 546; a creditor's bill and for the sale of lands, involving Rev. Stats. Indiana, 1852, volume 2, page 36 authorizing publication against unknown heirs.

Otis vs. *De Boer*, 116 Ind., 531; 19 N. E., 317; action to enforce lien of drainage assessment.

> "In proceedings *in rem*, proof of actual notice as against non-resident or unknown defendants is seldom, if ever, required."

Guise vs. *Early*, 72 Iowa, 283; 33 N. W., 683, involving a decree in suit to quiet title against known and unknown defendants under code (Iowa) Sections 2622, 2625.

Shirley vs. *Mitchell*, 3 J. J. Marshall (Ky.) 684; suit in chancery for distribution. Held, statute authorizing proceedings against unknown owners not having been followed, the proceedings were not binding upon them.

Benningfield vs. *Reed*, 8 B. Mon., 102; ejectment against unknown heirs of William Greenough. The proceeding was under a statute passed in 1802 (1 St. Laws Kentucky, 95). Decree held valid.

Hynes vs. *Oldham*, 3 T. B. Mon., 266, involved decree for specific performance against "the unknown heirs of White, the patentee of the land, and of Ramsey." Decree held valid on collateral attack.

Taylor vs. *Bate*, 4 T. B. Mon., 267, involved decree for specific performance against unknown heirs. Affidavit held defective.

Blight vs. *Banks*, 6 T. B. Mon., 192; ejectment bill.

Affidavit held not in compliance with statute providing for summoning of unknown heirs.

See to the same effect

Tevis vs. *Richardson Heirs*, 7 B. Mon., 654, 657;
Jeffrey vs. *Hand*, 7 Dana, 89;
Thurston vs. *Masterson*, 9 Dana, 228.

Foxcroft vs. *Barnes*, 29 Me., 128, sustaining the validity of a decree in partition as against persons sued therein as "unknown owners."

Coombs vs. *Persons Unknown*, 82 Me., 326; 19 Atl., 826; suit for partition of homestead.

> "The respondents cannot very well be injured by the absence of the minors, nor will the judgment of partition be void because of their absence. If so, then it must follow that many judgments on our records against persons unknown, where the notice has been by a general publication, will turn out to be void for the same reason."

Cook vs. *Allen*, 2 Mass., 462, sustaining a decree of partition as against one who was not a named party defendant, the process being directed only to "all persons interested." See to the same effect

Foster vs. *Abbott*, 8 Met. (Mass.), 596.

Loring vs. *Hildreth*, 170 Mass., 328; 49 N. E., 652. Bill to remove cloud from title.

> "It is conceded that there may be a good constructive service upon non-residents and unknown persons, because such service enables them to come in and defend."

Ware vs. *Easton*, 46 Minn., 180; 48 N. W., 775; action to determine adverse claims against named defendants "and also all other persons or parties unknown, claiming any right, title, estate, lien or interest in the real estate described in the complaint on file in the above action, and their unknown heirs" (under Gen. St. Minnesota, 1878, c. 75, Sec. 2, as amended by chapter 81, Law 1881, Extra Session). Decree held improper for noncompliance with the provisions of the statute.

Inglee vs. *Welles*, 53 Minn., 197; 55 N. W., 117; action to determine adverse claim (under same statute) against named defendants and "also all other persons or parties unknown."

> "We are of opinion that the mere fact that the named defendant was dead before the action was brought, did not prevent the Court from acquiring jurisdiction to determine the rights of 'persons or parties unknown' claiming an interest in the land described in the complaint."

Dewey vs. *Kimball*, 89 Minn., 454; 95 N. W., 317, 895; 96 N. W., 704; proceeding under Minnesota Torrens Act.

State vs. *Staley*, 76 Mo., 158; action to enforce lien of taxes against named party and "unknown heirs of John M. Staley, deceased," referring to Section 3499 Rev. Stats. Missouri, prescribing mode of service of summons on unknown parties.

Charles vs. *Morrow*, 99 Mo., 638; 12 S. W., 903, involved validity of decree in the city to collect taxes against "the unknown heirs of John W. Charles, deceased, and all defendants." It was held there was insufficient compliance with Section 3499 relating to service on unknown defendants.

Coombs vs. *Crabtree*, 105 Mo., 292. "The law assumes that service by ordinary summons cannot be had on non-resident and unknown owners and authorizes service by publication on them."

Myers vs. *McRay*, 114 Mo., 377; 21 S. W., 730; action involving decree in suit to collect delinquent taxes. Opinion refers to and construes Section 727 Rev. Stats. Missouri, relating to publication of summons against unknown defendants. See, also,

Rohrer vs. *Ader*, 124 Mo., 24; 27 S. W., 606.

Cole vs. *Hall*, 2 Hill (N. Y.), 625, upholding a decree of partition rendered on default as against persons sued only as "unknown owners."

> "Under our statute the proceedings in partition were in legal effect the same as though the suit had been instituted against the tenants in common with McNair by name. It was competent for them to contest his seizin in that suit, but it is too late to do so in this collateral proceeding."

Denning vs. *Corwin*, 11 Wend., 647, involving proceedings in partition directed against unknown owners. A judgment rendered in such proceeding was held invalid on the ground that it was not shown by affidavit (as required by statute), that the owners were in fact unknown.

> "To authorize a judgment of partition the parties must be before the Court, or it must be shown to the Court that some of them are unknown, and this must appear by the record; where the proceeding is against owners unknown, it is a proceeding *in rem* and nothing is to be taken by intendment."

Allen vs. *Allen*, 11 How. Pr., 277; suit for partition. Held party may proceed against unknown persons either "as unknown owners" or, if uncertain whether a certain party is dead, may proceed against him, naming him as, for instance, 'Thomas Allen, his wife and children, and other owners unknown.'" (Referring to section of New York code permitting suit against unknown owners.)

Moran vs. *Conoma*, 13 N. Y. Supp., 625; foreclosure of mortgage, naming as defendants

> "all persons unknown, having or claiming any interest in the premises described in the complaint, such unknown persons or owners being herein described as the wife, widow, heirs at law, devisees, grantee, assignees or next of kin, if any, of said G. C., and their respective husbands and wives, if any, all of whom and whose names, except as stated, are unknown to the plaintiff."

Held sufficient under Section 451 of the Code of Civil Procedure of New York, citing

Wheeler vs. *Scully*, 50 N. Y., 667.

People vs. *Ryder*, 65 Hun, 175; 19 N. Y. Supp., 977; partition suit against unknown heirs, in accordance with C. C. P. (New York) Section 1582.

Guyer vs. *Raymond*, 8 Misc., 606; 29 N. Y. Supp., 395; partition, summons beings served by publication upon a named party, "his wife, if any, his heirs, grantees, devisees or assignees as unknown defendants." Held proper under Section 438 of the Code of Civil Procedure of the State of New York.

> "We think his heirs, whoever they may be, are bound by the judgment, for they were properly

served as unknown defendants. *Wheeler* vs. *Scully*, 50 N. Y., 667; *Moran* vs. *Conoma* (Super. N. Y.), 13 N. Y. Supp., 625; *Abbott* vs. *Curran*, 98 N. Y., 665."

Rogers vs. *Tucker*, 7 Ohio St., 417, sustaining a decree in partition as against persons not appearing and sued only by the general designation of "unknown owners."

> "It is true the complainants aver that they were not made parties in the judicial proceedings under which the lands were adjudged and conveyed to Hope Tucker in 1883. The record, however, shows the contrary, and notice was published in a newspaper of general circulation in the county as provided in Section 3 of the 'Act to Provide for the Partition of Real Estate.' * * * This was a good notice and all persons in interest so notified thereby became parties and bound by the subsequent proceedings in the cause."

Harris vs. *Dougherty*, 74 Tex., 1; 11 S. W., 921, referring to, though not involving, an early Texas statute relating to service on unknown heirs, and requiring the appointment of an attorney to represent them.

Byrnes vs. *Sampson*, 74 Tex., 79; 11 S. W., 1073; suit for partition and general relief against persons named and unknown heirs, involving Texas statute (Laws Tex., 1866, page 125), permitting service on unknown defendants by publication. The case contains a review of the statutes in Texas showing the continued existence from early times of provisions permitting suits against persons unknown.

Talliaferro vs. *Butler*, 77 Tex., 578; 14 S. W., 191, involving validity of decree of partition against named persons, and the "heirs of Isaac Tichner," whose names and residences are alleged to be unknown.

Pool vs. *Lamon*, Tex. Civ. App. 28 S. W., 363, involving the validity of a decree in partition rendered against unknown owners, resident and non-resident. "The suit being trespass to try title and for partition, it was an action *in rem*, and as to the rights of the parties in the land, the judgment is binding upon the non-resident defendants as well as the other parties, but not so as to costs." The decree was therefore held valid as respects the land as to all persons included under the description "unknown owners," whether resident or non-resident, and was held valid as a judgment for costs (strictly *in personam*) as against such of the persons cited as "unknown owners" as were residents of the State at the time.

Bassett vs. *Sherrod*, 13 Tex. Civ. App., 327; 35 S. W., 312, involving the validity of a decree for partition and general relief against unknown heirs of a number of persons. The decree held valid as against parties impleaded under the designation of "unknown heirs."

American Building Association vs. *Mathews*, 13 Tex. Civ. App., 425; 35 S. W., 690, referring to Acts 1893, (Texas) page 77, enacted

> "evidently in view of the decision in *Arndt* vs. *Griggs*, 134 U. S., 316, 10 Sup. Ct., 557, by which service by publication or by notice, as then or thereafter provided by law for citation against non-residents, *persons unknown* or transient persons, was distinctly authorized as to such persons."

Kilmer vs. *Brown*, Tex. Civ. App. 67 S. W., 1090, involved the validity of a decree in partition suit, the heirs of a deceased non-resident being named as parties.

Held that the statutes of Texas authorized such citation of unknown heirs, and that "the unknown heirs of Maria Pidilla were properly cited."

Kane vs. *Rock River Canal Company*, 15 Wis., 179, involving the validity of a decree in partition affecting the rights of persons cited as unknown owners.

> "If properly made a party as an unknown owner, he is bound in the same way as he would be if named as a party and served with process personally."

To the same effect see *Nash* vs. *Church*, 10 Wis., 303, in which there is a lengthy discussion of the conclusive effect of decrees in partition against persons sued as "unknown owners."

Truesdell vs. *Rhodes*, 26 Wis., 215, suit to remove cloud from title, certain defendants being named only as the unknown heirs of William Rhodes, deceased. It was objected that such heirs should be made defendants by name, and that the proceeding against them as "the unknown heirs of William Rhodes, deceased, and the unknown owners" of the lands in dispute was not authorized. The Court says:

> "This is a mistake on the part of counsel. Sec. 46 of the act under which this suit is instituted, expressly authorizes the proceeding against them as 'unknown owners'; and the complaint which alleges the fact is in this respect sufficient."

Gray vs. *Gates*, 37 Wis., 614, referring to and involving a statute of 1859 of Wisconsin, permitting suits by the owners of tax titles to bar the title and interest of the former owners in the lands sold, such owners where

their names were not known to be described in the proceeding as unknown owners.

Meyer vs. *Kuhn*, 65 Fed., 705, involving the validity of a decree in a partition suit naming certain "unknown heirs" as a defendant in accordance with the statute of West Virginia referred to in the opinion.

Brickell vs. *Farrell*, 82 Fed., 220, upholding a decree rendered in a suit to enforce a tax lien in which, in accordance with Section 2027, Rev. St. Mo. 1889, the defendants whose names were unknown were served by publication as "unknown owners."

Compare also *Bryan* vs. *Kennett*, 113 U. S., 179; 5 Supreme Court Rep., 407, referring to, although not involving, statutes of Missouri, providing for service generally upon unknown claimants.

Huling vs. *Kaw Valley Railroad Co.*, 150 U. S., 559; 9 Supreme Court Rep., 603, sustaining a judgment rendered in a condemnation proceeding under a statute prescribing merely the publication of a notice addressed "to all persons owning land on the line of the railroad" as the same is now or may be located through Sec. 23, T. 11, R. 25, in the County of Wyandotte and State of Kansas." The opinion is by Mr. Justice Miller.

Leigh vs. *Green*, 193 U. S., 79, upholding as valid a decree rendered in an action authorized by the Nebraska statutes to enforce the lien acquired by the purchaser of the property at a tax sale. The action was in form against persons named and the land itself. It was held that the requirements of due process of law were satisfied where notice was given by publication addressed to the defendants named, "and all persons interested in

said real estate." The Court cites and makes quotation from the opinion of Mr. Justice Holmes in *Tyler* vs. *Registration Court Judges*, 175 Mass., 71; 51 L. R. A., 433; 55 N. E., 812. It is said in the opinion

> "The evident purpose of Section 4, where the owner of the land is unknown is to permit a proceeding *in rem* against the land itself, with a provision for service as in case of a non-resident."

and such a proceeding is held to satisfy the requirements of the Federal Constitution.

The above list of cases is by no means exhaustive of those in which the power of a State to proceed against unknown owners in suits involving the title to land has been adjudicated or recognized. These cases are not cited by us as being all of them cases in which the validity of such proceedings was determined. In many, this was done. In others, it was held that the provisions of the particular statute providing for service against unknown owners had not been complied with, and therefore that a decree rendered against them was invalid. But in none is there a suggestion that a State is impotent to authorize suits against unknown claimants in order to settle the title to land within its boundaries. In all, either by expression or by implication, that power is recognized, and the validity of such statutes is either assumed or expressly vindicated.

With this necessarily brief review of the numerous cases in which statutes upholding proceedings against unknown owners to quiet title to land and in analogous cases have been upheld and applied, we shall consider very briefly those cases upon which counsel rely in sup-

port of the view that such proceedings are unauth ed. They are

The dissenting opinion of Mr. Justice Loring in *Tyler* vs. *Judges of Court of Registration*, 175 Mass., 71; 55 N. E., 812; 51 L. R. A., 853;

Hill vs. Henry (N. J. Eq.), 57 Atl., 554;

Webster vs. *Reid*, 11 How., 437;

People vs. *Simon*, 176 Ill., 165; 44 L. R. A., 801;

State vs. *Guilbert*, 56 Ohio St., 575; 47 N. E., 551; 60 Am. St., 756;

Brown vs. *Levee Commissioners*, 50 Miss., 468;

Bardwell vs. *Collins*, 44 Minn., 97;

Bear Lake County vs. *Budge* (Idaho), 75 Pac., 614.

These cases are considered and distinguished by Mr. Justice Sloss in his opinion in *Title, etc. Restoration Co.* vs. *Kerrigan*, 150 Cal., 289, 316, 317. They may, however, be very briefly reviewed.

The dissenting opinion of Justice Loring in *Tyler* vs. *Judges of Court of Registration*, 175 Mass., 71; 55 N. E., 812; 51 L. R. A., 853, has already been given some consideration in this brief. It is, to begin with, a dissenting opinion, opposed to the views of a majority of the Court in that case. So far as it relates to the right of a State to bind unknown owners, it holds that this is possible only in an action strictly *in rem*, and that the Massachusetts Torrens Act there under review was not a proceeding strictly *in rem*. The reasoning of the opinion is, we submit, conclusively answered in that rendered by Chief Justice Holmes. The result of Justice Loring's position is opposed to a weight of authority so

great, that it is difficult to understand how, in the face of all the cases upholding the validity and applying the provisions of statutes intended to bar unknown owners, it could be said that "*there is no precedent* for holding that the rights of persons not named as defendants" (that is, sued as "unknown owners") can be barred except in a proceeding "to enforce a liability for which the *res* is liable irrespective of who owns it."

That the California statute would be sustainable as affording due process of law even under the views of Justice Loring is a proposition already discussed and hereinafter again considered.

Hill vs. *Henry*, 57 Atl., 554, is a case decided not by the court of appeals of New Jersey, but by a single Vice-Chancellor. While there is much language in the opinion to the point that in suits *quasi in rem*, it is "doubtful" whether it would be due process of law to serve all defendants by a general description, it will be seen that the language of the Vice-Chancellor, when closely examined, does not reach the case involved in the proceeding at bar. According to it a suit to quiet title is neither strictly *in rem* nor *quasi in rem*, but presents "a further case," in which, it admits, the Supreme Court of the United States has held that where the decree affects the *res* directly, it binds, without personal service, at least if the statute has provided "a reasonable method of imparting notice" (citing *Arndt* vs. *Griggs*, 134 U. S., 360).

After a lengthy discussion of "suits strictly *in rem*," "suits *quasi in rem*," "due process of law" and "actions against indefinite classes," the Vice-Chancellor in express terms *refuses to decide* the question, stating:

> "Counsel has referred me to no case in which the precise question has been adjudicated, and I have found none. In the present condition of the authorities I ought not to pass upon a question of so much difficulty if the decision may be rested on another ground, and I think it may. The above discussion is not irrelevant, for it, at least, indicates that the section should not be extended to cases which it does not clearly reach."

The case was decided upon the ground that the statute, the validity of which the Vice-Chancellor impeached but did not feel capable of determining, had no application at all to a proceeding of the kind then before him.

Obiter dicta are often entitled to much consideration. We submit, however, that but little weight should be given to expressions confessedly *obiter*, which (like those in the case just considered) left the mind of their author unconvinced to the point that he felt it improper to pass upon the question, and which took no note of the multitude of authorities sustaining partition suits, suits to quiet title, etc., as against unknown claimants sued by general designation.

Webster vs. *Reid*, 11 How., 437, was, as Mr. Justice McLean described it, "an extraordinary procedure from its commencement." Certain commissioners, whose duty it was to partition lands owned by half-breed Indians in Lee County, Iowa, brought suit to recover the amount owing them for services rendered. By the act under which these suits were instituted, no other desination of the defendants was required than "owner of the half-breed lands lying in Lee County." The Court says:

> "These suits were not proceedings *in rem* against the land, *but were in personam against the owners of it.* Whether they all resided within the territory or not does not appear, nor is it a matter of any importance."

This, of course, was a pure action in personam. So far as appears none of the defendants was unknown. There was no necessity for joining them as an indefinite class, and the case was described by Mr. Justice Hunt in a subsequent one (95 U. S., page 745), as

> "apparently an attempt dishonestly to obtain the Indian title, and not intended to give a substitution for a personal service which would be likely, or was reasonably designed, to reach the persons to be affected."

Apart from this the case involved a proceeding purely *in personam*, and in numerous subsequent decisions of the United States Supreme Court its limitations have been recognized and defined. It is in no way relevant to the question now under discussion.

People vs. *Simon*, 176 Ill., 165; 52 N. E. 910; 44 L. R. A., 810, so far from being a case opposed to the principle that a State may authorize a decree to quiet title binding unknown owners, is direct authority for that proposition. In that case the Illinois Torrens Act was upheld. Quotation has already been made from the opinion, where reference is made to the general law of Illinois authorizing publication of notice to unknown owners. It is, however, claimed by counsel for appellant that certain language in the opinion looks the other way. The Court, in referring to a section of the act which provided that the decree rendered under

it should be binding upon "any person who has any interest in the land, whether personally served, notified by publication *or not served at all,*" said that "if given effect *literally* it would deprive persons of vested rights without due process of law." The language is perhaps confusing, but evidently refers to the *literal* meaning of the provisions of the act, by which the decree was declared to be binding upon persons "*not served at all.*" The holding is plainly that, where unknown claimants are duly served in accordance with the general law of Illinois providing for service on such claimants, the plaintiff might, "in strict accordance with the act, obtain a decree or finding as to his title which will be binding beyond all question." (See the discussion of this case in *Title, etc. Restoration Co.* vs. *Kerrigan,* 150 Cal., 289, 316.)

In *State* vs. *Guilbert,* 56 Ohio St., 575; 47 N. E., 551; 60 Am. St., 756, the Torrens Act of Ohio was held unconstitutional. No process at all was provided. The notice given was not to contain the names even of known claimants residing within the State.

This, the Court held, did not constitue due process of law. In the course of the opinion it is said:

> "That the legislature may provide for a substituted service of judicial process, when it is required by necessity, is not doubted. If, in a suit to adjudicate the rights of persons in property within the State, a defendant resides without the State, such necessity is apparent, for the process of the State has no efficacy beyond its borders. Other cases of necessity are recognized.
>
> "*The principle is that the State may provide for the adjudication of all adversary rights of persons*

in property within its borders, and, to the end that such jurisdiction may be complete, the legislature may provide a substituted service of process for cases in which actual service cannot be made.

"In such case nothing more is required by the law of the land than that the substituted service shall be such as, in the exercise of legislative discretion shall be found most apt to accomplish the purposes of actual service. *Shepherd* vs. *Ware*, 46 Minn., 174; 24 Am. St. Rep., 212. Surely, these views will surprise no one who is familiar with the legislative history of the State."

In the Ohio statute no process of the Court was provided, but the only notice required to be given was *by the applicant*, by publication once a week for four consecutive weeks "in some newspaper of general circulation." As is said by the Court:

"In the notice so required to be given no one claiming an interest adverse to that of the applicant is to be named, *although the names, places of residence and alleged interests of all who may claim adversely are known.* * * * *One known to claim the title in fee simple adversely to the applicant need not be named in the application, nor receive a copy of the notice, though his place of residence may be within the county and known.* As to him, the only requirement is that he may have a chance to see a notice signed by the applicant, addressed 'To whom it may concern,' containing a brief description of the land to be registered, and published in any newspaper of general circulation within the county."

The provisions of that act omitted requirements which have always been held necessary to constitute due process of law. The case is no authority upon any proposition involved in the proceeding at bar, and the Supreme

Court of Illinois, while upholding the Illinois Act, nevertheless agreed that the Ohio act was unconstitutional.

People vs. *Simons*, 176 Ill., 165, 179.

The language of the Ohio case has been without doubt properly the subject of criticism (see *Tyler* vs. *Judges, etc.*; 175 Mass., 71; 55 N. E., 812; 51 L. R. A., 853, per Holmes, J.), but it is plainly not authority where the provisions as to notice are such as appear in the statute here involved.

State vs. *Westfall*, 85 Minn., 437; 89 N. W., 175;
Title, etc. Restoration Co. vs. *Kerrigan*, 150 Cal., 289, 317.

In *Brown* vs. *Levee Commissioners*, 50 Miss., 468, a statute provided for quieting title to lands (purchased under tax sales) on the mere publication of a notice addressed to "all parties or persons having any interest, either legal or equitable, in or to said lands." *There was no provision for personal service of process on known claimants.* The Court, however, expressly recognized the validity of notice by publication to absent and non-resident defendants who could not be personally served with notice in suits relating to property within the jurisdiction, and the validity of notice by general description, such as "unknown heirs of a decedent, *where the plaintiff does not know and cannot ascertain their names.*" (See, also, *Belcher* vs. *Mhoon*, 47 Miss., 613, an opinion delivered by the same judge.) "But," it is said in the opinion (p. 485),

> "there is no instance in our legal history where a judicial process has been allowed in *personal suits*,

dispensing with notice, actual or constructive, addressed to the parties by name, to be charged thereby, *where it could be readily ascertained who they were.* * * * *It is also evident that the names of many, if not most of those, were known or could have been known to the levee commissioners.*"

That this case has not been understood in the State of its rendition as denying the right of a legislature to provide for constructive service on *unknown* persons, is shown by the fact that the proceeding to confirm tax titles held constitutional in *Belcher* vs. *Mhoon,* 47 Miss., 613, remains to this day on the statute books of Mississippi (though the laws have twice been codified since the decision in *Brown* vs. *Levee Commissioners*), and has since that decision been continually acted upon.

Chrissman vs. *Currie,* 60 Miss., 858;
Metcalf vs. *Perry,* 66 Miss., 68; 5 So., 232.

In *Bardwell* vs. *Collins,* 44 Minn., 97, 46 N. W., 315, an action was brought to foreclose a mechanic's lien, under a statute allowing service by publication in cases of this class, even as against residents who could be found within the jurisdiction; where no personal judgment was sought. The Court held that such a judgment could not be sustained. Shortly after the decision of the case, which in no way conflicts with any proposition urged by us in the case at bar, the Supreme Court of Minnesota decided the case of *Shepherd* vs. *Ware,* 46 Minn., 174; 48 N. W., 773; 24 Am. St., 212, in which it upheld a statute authorizing a judgment in proceedings to quiet title to land in the State concluding unknown persons notified by publica-

tion of a notice addressed generally to "persons unknown, claiming an interest in the real estate described." In the course of the opinion, after reference to the fact that the judgment affected the property, and was to this extent a judgment *in rem*, the Court says:

> "This aspect of the question was not considered by this Court in reference to this class of actions in *Bardwell* vs. *Collins*, 44 Minn., 97, 46 N. W., 315."

Bear Lake County vs. *Budge* (Idaho), 75 Pac., 614, is a case in which a statute providing for proceedings to settle water rights upon streams was held unconstitutional on the ground that

> "it fails to require the personal service of summons *on known defendants residing in such county* [that is, where the suit is pending] and is in conflict with those provisions of our State constitution, as well as the Constitution of the United States, which provide that no person shall be deprived of life, liberty or property except by due process of law. Those provisions prohibit the legislature from dispensing with personal service of summons *when it is practicable.*"

The Court, however, *expressly upheld* the right of a State to prescribe such proceedings upon constructive notice to *unknown persons* and non-residents, saying:

> "*Of course, if defendants are in reality unknown,* or if known and reside outside of or cannot be found within the State, *publication of summons must of necessity be sufficient as provided by our statutes.*"

In conclusion upon this point, we submit that the right of a State to prescribe proceedings for the purpose of

quieting title to land within its borders, in which provision is made for the adjudication of rights of unknown claimants, sued by general designation, and afforded reasonable notice by publication or other recognized *media* of constructive service, cannot now be held to be an open question.

VIII.

THE NOTICE TO UNKNOWN CLAIMANTS PROVIDED BY THE ACT UNDER DISCUSSION IS REASONABLE AND CONSTITUTES DUE PROCESS OF LAW.

A. The Act Employs Every Mode of Constructive Service Known to the Law.

With the numerous cases showing the permissibility of proceedings against unknown claimants already reviewed, little remains to be said upon the constitutional validity and legal efficacy of the notice to such claimants which the statute of June, 1906, prescribes. Indeed, all that can or need be said upon the subject is that it prescribes every means of constructive notice known to our system of law.

A bill is filed describing the property, a notice of the pendency of the action is at once recorded, the land affected by the proceeding is platted upon maps lodged in the office of public records and devoted exclusively to that purpose, the summons is posted upon each separate parcel of the land itself, process is served personally upon all who can be reached by such service, it is mailed to every non-resident whose name is known, to his address if ascertainable, to him at the county seat of the county in which the land is situated if his address is un-

ascertainable. Finally, the summons containing a particular description of the land affected by the action, requiring all parties interested to appear, and notifying all persons of the relief demanded, is required to be published at least once a week for a period of two months in a newspaper of general circulation designated by the Court in which the action is pending. As said by Mr. Justice Sloss in *Title, etc. Restoration Co.* vs. *Kerrigan*, 150 Cal., 289, 312:

> "*If, by a substituted service of any sort, a court may be given power to adjudicate the rights of unknown claimants in a proceeding of this character, it seems plain that the notice to such claimants here provided is sufficient.* All substituted service must rest upon the ground of necessity, and where it is permissible at all, it must be such as would be reasonably likely to bring the fact of the pendency and the purpose of the proceeding to the attention of those interested. Where, as here, the summons describing the nature of the action, the property involved, the name of the plaintiff and the relief sought, is posted upon the property and is published in a newspaper for two months, and a *lis pendens* containing the same particulars is recorded in the recorder's office and entered upon the recorder's map of the property, *we cannot doubt* that so far as concerns the possible claimants who are not known to the plaintiff, the notice prescribed by the act is as complete and full as, from the nature of the case, could reasonably be expected."

In the majority opinion in *Tyler* vs. *Judge of the Court of Registration*, 175 Mass., 71; 55 N. E., 812, it was said, speaking of the Massachusetts Torrens Act:

> "If it does not satisfy the constitution, a judicial proceeding to clear titles against all the world

> hardly is possible; for the very meaning of such a proceeding is to get rid of unknown as well as known claimants—indeed, certainty against the unknown may be said to be its chief end, and unknown claimants cannot be dealt with by personal service upon the claimant."

While it is contended in the brief of appellant that the notice prescribed by the statute is not "reasonable" (and this contention is embellished with adjectives such as "absurd," "shocking," etc.), the argument when analyzed, amounts to nothing more than a claim that *no* notice in a proceeding substantially *in rem* addressed to unknown claimants can be "reasonable" or afford due process of law. To this every case which we have cited under the preceding heading of this brief and which sustains actions against unknown claimants, is an answer. Such claimants obviously cannot be described except by general designation nor reached except by constructive service of process.

On pages 160 *et seq.* of appellant's brief is advanced the suggestion that "no reasonable notice can be imparted by a publication not naming or describing the person cited and not making any allegation against him." The latter portion of this statement concerns the claim that the action provided by the statute is "non-judicial" in character and is hereafter discussed. It is sufficient at this point to observe that it is not the function of *notice* to "make allegations" against a defendant.

> "Notice is only for the purpose of affording the party an opportunity to be heard upon the claim or charges made. It is a summons to him to appear

and speak if he has anything to say, why the judgment should not be rendered."

Windsor vs. *McVeigh*, 93 U. S., 274.

The "allegations" in a summons or any other form of notice are those which inform a defendant that a proceeding is pending, that certain relief is asked, and that he is called upon to appear in the protection of his interests. The summons provided for in Section 3 of the act, so far as its "breadth" in these particulars is concerned, is as broad as any notice required by common law or, so far as we know, by any statute ever enacted.

The suggestion that "no reasonable notice can be imparted by a publication not naming or describing the person to be cited," either means nothing in reference to the present case, or is untrue. The summons prescribed by the act under consideration is one which names and describes as defendants "all persons claiming an interest in or lien upon the real property herein described, or any part thereof." The "property herein described" is particularly described in the summons. Among the multitude of statutes which provide for suits against unknown owners, no means has yet been devised of describing an *unknown* claimant to certain land except by designating him as such, and describing the land involved. The validity of such process may, without further discussion, be rested upon the cases already cited, which affirm the validity of proceedings against unknown owners generally.

The cases cited in support of this contention are cases in which known and named defendants have

been *erroneously named* in a summons. We confess ourselves unable to appreciate what possible connection there can be between the point under discussion and authorities dealing with the misnomer of named defendants.

On page 140 of the brief for appellant it is said:

> "We make bold to assert that no case can be cited in which a judgment not strictly *in rem* has ever been held conclusive except as to parties and privies, and then only if rendered in a proceeding upon regular allegations directed against a named or otherwise specifically designated defendant."

This statement is of a somewhat cryptic nature. Its meaning depends upon the significance which lies in the phrase "or otherwise specifically designated defendant." If, however, it has any force at all in appellant's argument, it means that they "make bold to assert" that no proceeding substantially *in rem* has ever been held to bar persons sued as unknown claimants and designated as such. There is no occasion to review the numerous cases already cited in which unknown owners have been sued by general designation and in which such proceedings have been upheld. Even if we limit ourselves to those cases in which the validity of such proceedings has been expressly involved and in which they were held *res judicata* and binding upon persons described as unknown claimants, the cases are sufficiently numerous to make impracticable even a citation of all of them at this point. We refer counsel to the following cases wherein it was so

held with respect to persons sued as unknown claimants in proceedings for partition:

Mason vs. *Messenger*, 17 Ia., 261;
Foxcroft vs. *Barnes*, 29 Me., 128;
Cook vs. *Allen*, 2 Mass., 462;
Foster vs. *Abbott*, 8 Metcalf (Mass.), 596;
Cole vs. *Hall*, 2 Hill (N. Y.), 625;
Rogers vs. *Tucker*, 7 Ohio St., 417,

and to the following in which the same was held with respect to persons sued as unknown claimants in proceedings to quiet or establish title or to settle adverse claims:

Shepherd vs. *Ware*, 46 Minn., 174; 48 N. W., 773; 24 Am. St. Rep., 212;
McClymond vs. *Noble*, 84 Minn., 329; 87 N. W., 838; 87 Am. St. Rep., 354;
Walker vs. *Ogden*, 192 Ill., 314; 61 N. E., 403.

B. The Notice to Unknown Claimants is not Only as Full as Could Be Devised, But is of the Same Efficacy as That Afforded by Any Proceeding in Which the Rights of Such Persons May Be Concluded.

A large part of appellant's brief is devoted to an attempt to explain in various ways (consistent with the view that the rights of unknown owners cannot be barred upon constructive notice, in a suit to quiet title) the many classes of proceedings by which the rights of such claimants have been concluded from time immemorial. Admiralty proceedings *in rem*, probate proceedings, proceedings to establish escheats, tax cases, condemnation

proceedings, insolvency proceedings, fines and recoveries at common law, etc., are each sought to be explained upon one ground or another as distinguishable from the case at bar.

Some are explained as actions strictly *in rem* and as pre-empting that field to the exclusion of the right of a state to prescribe a proceeding *in rem* for any other purpose. Others are explained on the ground that they are mere enforcements of prerogative power in which no notice whatever to claimants would be required from a constitutional point of view. Others are explained as being mere judicial substitutes for what might have been administrative proceedings and in which "due process of law" is afforded by requirements which when prescribed in the statute under discussion counsel regard as affording no notice at all and as "absurd" and "shocking." Others still are explained as devices for setting in operation the statute of limitations.

There is, however, a large class of cases which are not to be explained upon these or any other grounds of distinction, and are, therefore, left either entirely unnoticed in the brief for appellant or, where noticed, are said to have been wrongly decided.

Among the cases which counsel find no possible ground for distinguishing and which are, therefore, urged to have been wrongly decided, are a number which uphold the Torrens acts of different states. These acts have been upheld in Massachusetts, Minnesota, Illinois, Colorado and California.

Tyler vs. *Judges of Court of Restoration*, 175 Mass., 71;

State ex rel Douglas vs. *Westfall,* 85 Minn., 437; 89 N. W., 175;

People vs. *Simon,* 176 Ill., 165; 44 L. R. A., 801; 52 N. E., 910.

People ex rel Smith vs. *Chrissman* (Colo.), 92 Pac., 949.

Robinson vs. *Kerrigan,* 151 Cal., 40.

The Massachusetts case (*Tyler* vs. *Judges*) went to the United States Supreme Court, but was dismissed on the technical ground that the appellant, having had actual notice of the proceedings, was not entitled to question the validity of the proceedings as against those reached only by constructive notice. (179 U. S., 405.)

In McGehee on "Due Process of Law under the Federal Constitution," a late and a valuable work upon this subject, the author reviews at length the various decisions of the United States Supreme Court dealing with the sufficiency of constructive process in proceedings substantially *in rem.* The result of the authorities in the Supreme Court of the United States is that (p. 117):

> "In short, it would seem that any proceeding is *in rem* for the purpose of jurisdiction which the political exigencies of the State, that is, public policy, require should be effective upon service by publication or constructive service.
>
> "In upholding the provisions of the Massachusetts Torrens Act, which made the registration of title conclusive as against every one, without personal service of citation, Chief Justice Holmes, in a passage which represents his own views only, said: 'If, on the other hand, the object is to bar indifferently all who might be minded to make an objection of any sort against the right sought to be established, and

> if any one in the world has a right to be heard on the strength of alleging facts which if true show an inconsistent interest, the proceeding is *in rem*. 2 Freeman Judgm. (4 Ed.) 606. All proceedings, like all rights, are really against persons. Whether they are proceedings or rights *in rem* depends on the number of persons affected.'
>
> "This is surely sound sense and seems to be warranted by the trend of the modern cases."

Speaking of the dismissal of the Massachusetts case on appeal in the United States Supreme Court, the author says:

> *"The validity of the act would seem to follow from the (U. S.) Supreme Court cases cited above."*

The numerous statutes providing for the joinder of unknown claimants by general designation in suits to quiet title, for partition, etc., and the numerous cases upholding the validity of such judgments as against parties so sued, receive little or no consideration in appellant's brief. They are, we submit, controlling, so far as authority can be controlling, in the case at bar.

In view of the authorities directly in point sustaining proceedings against unknown owners under the provisions of the various Torrens acts, in suits to establish and quiet title, to settle adverse claims, for partition, etc., there is, perhaps, no necessity for considering whether other classes of proceedings furnish additional analogies in support of the procedure prescribed by the statute under discussion. We may, however, briefly review the various grounds of distinction urged in this connection, not because the case depends upon the validity or invalidity of such distinctions, but because it may be shown that

in none is the notice prescribed different or fuller than that afforded by the statute under discussion.

Admiralty proceedings *in rem* furnish, of course, the most prominent instance of actions strictly *in rem*. We have considered already the contention that they can be justified only because of the fiction that the *res* itself is "liable—irrespective of who owns it." In the brief for appellant, however, much is made of the suggestion that admiralty proceedings *in rem* are sustainable as due process of law only because the seizure of the property must give actual notice to the agents of the owner.

In point of fact, seizure of the property in an admiralty proceeding *in rem* is not relied upon as the step which in and of itself effects notice to the owner. Originally the practice in admiralty recognized

> "no distinction between actions *in rem* and actions *in personam*, for where the person against whom a warrant was issued could not be found, or lived in a foreign country, and goods were seized (Roscoe's Ad. Prac., p. 40) by the Court to answer the debt, these goods were not specific goods, subject to a lien, but the seizure was made for the purpose of compelling appearance in a way analogous to the proceedings by foreign attachment under the charters of the cities of London and Dublin."
>
> Mears' Admiralty Jurisdiction, Selected Essays in Anglo-American Legal History, Vol. 2, p. 348 (being also the introductory chapter of Roscoe's Admiralty Jurisdiction and Practice [1903]).

Historically, therefore, actions *in rem* in admiralty are traceable to proceedings in foreign attachment, strictly

analogous to those by which in this country the property of a non-resident is attached and made liable for his debts on constructive notice to him.

The person of the defendant was seized, if he could be found within the jurisdiction. If not, his goods were seized whether they were subject to a specific lien or not. (See Mears' Admiralty Jurisdiction, *supra*, p. 348.) From a proceeding which was thus exactly what we now know as one "substantially *in rem*," there developed a proceeding strictly *in rem*. The change was made necessary by the conflict between the admiralty court and the courts of common law. It was effected by adopting the fiction of a liability in the *res*. The common-law courts prohibited

> "actions against individuals personally, whilst they allowed actions to proceed when based upon a claim over the *res*,"

and

> "the admiralty court was driven to arrest property in the first instance on the ground of hypothecation or lien, so as to have jurisdiction *quoad* the *res* and to avoid the question of jurisdiction *quoad* the owner, with the result that the proceeding by arrest of the person compelling bail to be given to submit to the jurisdiction of the Court became obsolete, and the practice of attaching the goods or a ship of a party who could not be found, or who lived in a foreign country, to compel appearance also fell into disuse. (Mears' Admiralty Jurisdiction, *supra*, p. 349, note 4.)"

This, of course, shows how frail is the contention that admiralty proceedings *in rem* were historically justified only because the *res* was "liable—irrespective of who

owns it." But it has a further significance. The seizure, being historically a mere method of acquiring jurisdiction over the *res*, was not relied upon to insure notice to the owner, but such notice was (as it is now) given by public citation, published or otherwise constructively served on all interested. It is no doubt true that the seizure of a ship does, in most cases, afford notice of the action to the agents of the owner, but the theory of the law is that this is true of *all* property, of lands as well as ships.

> "The law assumes that property is always in the possession of its owner, in person or by agent, and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the Court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale."
>
> *Pennoyer* vs. *Neff*, 95 U. S., 714, 727.

On the other hand, even in admiralty proceedings *in rem*, constructive notice by public monition, publication or otherwise, is the necessary basis of further proceedings which are to be binding upon the interest of the owner in the *res*.

> "The position of the defendant's counsel is that, as the proceeding for the confiscation of the property was one *in rem*, the court, by seizure of the property, acquired jurisdiction to determine its liability to forfeiture, and consequently had a right to decide all questions subsequently arising in the progress of the cause; and its decree, however erroneous, cannot, therefore, be collaterally assailed. * * * But the preliminary proposition of the counsel is not correct. The jurisdiction acquired by the Court by seizure of the *res* was not to condemn the

> property without further proceedings. * * * The seizure in a suit *in rem* only brings the property seized within the custody of the Court and informs the owner of that fact. *The theory of the law is that all property is in the possession of its owner in person or by agent, and that its seizure will therefore operate to impart notice to him.* * * * The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges. *To this end some notification of the proceedings beyond that arising from the seizure, prescribing the time in which the appearance must be made, is essential. Such notification is usually given by monition, public proclamation, or publication in some other form. The manner of the notification is immaterial, but the notification itself is indispensable.*"
>
> *Windsor* vs. *McVeigh*, 93 U. S., 274, 278, 279.

If, therefore, regard be had either to the historical origin of the action *in rem* in admiralty, or to the process by which the world (meaning all those interested) become notified of the proceeding, it is plain that the admiralty proceeding *in rem* was nothing more historically than an action substantially *in rem*, and that the process which the law relies upon as affording notice to the owner is not the seizure of the property alone, but the constructive notice "given by monition, public proclamation, or publication in some other form."

In the brief for appellant it is urged (pp. 126, *et seq.*) that the one thing which saves an admiralty proceeding *in rem* from being "manifestly contrary to natural justice," is that the person in charge of the property seized is in all cases the agent of the owner. This, as already

pointed out, is the theory of the law with respect to *all* property, but the very case from which this phrase was taken shows that the constructive notice afforded by public monition, quite as much as the seizure of the vessel in the hands of the owner's agents, would save a proceeding *in rem* from being "manifestly contrary to natural justice."

> "Unless it were considered that *either* by means of the publicity of the manner of arresting the property, *or by means of the publicity of the notice or citation,* the owner had an opportunity of protecting his property from a final decree by the court, the judgment *in rem* of a court would be manifestly contrary to natural justice."
>
> *The Parlement Belge,* L. R. 5 P. D., 197, 218.

As held in *Windsor* vs. *McVeigh,* 93 U. S., 274 (*supra*), it is the public monition, and not the seizure alone, which as notification to the owner gives the Court jurisdiction to proceed in the exercise of its control over the *res* acquired by the seizure.

The cases cited to show that a master is prevented from bringing an action *in rem* against the ship, because he would thereby seize property in his own custody as agent, shows that the real ground is that the master is not given a lien upon the ship by the substantive law. How small a part the fact that the master is in charge of the vessel as agent of the owner plays in denying him the right to maintain a proceeding *in rem* may be seen by a reading of the two cases,

> *The Larch,* 2 Curtis 427; Fed. Cas., 8085;
> *The Grand Turk,* 1 Paine 73; Fed. Cas., 5683;

from which carefully selected quotations are made in the brief for appellant (pp. 127-128).

A master may, under the present law of England, maintain a proceeding in rem.

The Tagus, L. R. (1903) Prob. Div. 44.

We submit that there would be no more constitutional objection to allowing a master the right to maintain a proceeding *in rem* were a lien upon the vessel given him by the substantive law than there is for permitting a tenant to maintain a suit *quasi in rem* against a non-resident debtor (who may be his landlord), on attaching the property of the landlord within the jurisdiction of the State.

It is obviously impossible within the necessary limits of this brief to consider all of the authorities dealing with admiralty proceedings *in rem* which are cited in the brief for appellant. Such proceedings, however, had their origin in a practice which, at the most, was *quasi in rem*, and their validity depends upon constructive notice no more effectual and not as elaborate as that provided by the act under discussion. They are *in form* against the property. They are *in fact* against the owners and implead all interested through a symbolic action against the property. (*The Parlement Belge*, L. R. 5 Prob. Div., 197.)

> "*Naming the res* as defendant, although a convenient way of indicating that the proceeding is against property alone—that is to say, that it is not to establish an infinite personal liability—is not of the essence. If in fact the proceeding is of that

> sort, and is to bar all the world, it is a proceeding *in rem.*"
>
> *Tyler* vs. *Judges,* 175 Mass., 71; 55 N. E., 812.

Proceedings for the administration of estates of decedents operating strictly *in rem,* and conclusively disposing of title to property within the limits of the State, are, of course, of established validity. They are sought to be distinguished, however, by the suggestion that a State has absolute power over matters of succession, and (although the argument is not pressed to this limit, its logical conclusion is) that *no* notice to those to whom property has succeeded, or has been devised, is necessary to constitute due process of law.

It is a sufficient answer to point out that probate proceedings have been sustained, as said by Chief Justice Holmes in *Tyler* vs. *Judges of Court of Registration,* 175 Mass., 71; 55 N. E., 812,

> "not upon the ground that the State has an absolute power to determine the persons to whom a man's property shall go at his death, but upon the characteristics of a proceeding *in rem.*"

So in the case of escheat, which counsel seek to distinguish upon the same ground, the right of a State to prescribe such proceedings is put not upon its absolute power over matters of succession, but upon the ground that a State has power

> "to provide for determining and quieting the title to real estate within the limits of the State and within the jurisdiction of the court after actual notice

> to all known claimants and notice by publication to all other persons."

Hamilton vs. *Brown*, 161 U. S., 256.

This power to determine the title to a *res* within the borders of the State has in recent years been applied to uphold proceedings for the settlement of the estates of *absentees*, which, while operating *in rem* as against all persons succeeding under the absentee, operate also to foreclose such absentee, even though living, of vested rights. Statutes of this kind, sustained by the Supreme Court of the United States (*Cunnius* vs. *Reading School District*, 198 U. S., 458), are upheld

> "on the broad ground that the property dealt with is subject to the burdens and obligations of property generally in the State, and that a statute authorizing the precedure is within the police powers of the State and necessary for the well-being of society."

McGehee on Due Process of Law, p. 118.

Tax proceedings, proceedings in condemnation, etc., are distinguished in the brief for appellant as being mere judicial substitutes for administrative proceedings. If this were conceded, it remains nevertheless true that in all such cases reasonable notice is held an essential of due process of law, and that constructive notice, addressed generally to all interested and published for a reasonable length of time, has been held to satisfy the requirements of the Constitution in this regard.

Without continuing the discussion of the various distinctions suggested by counsel between proceedings admittedly valid and those prescribed by the statute under

consideration, we submit that the notice prescribed by the latter is reasonable, and, within all the authorities, affords due process of law to unknown claimants.

C. The Contents of the Affidavit Filed With the Complaint Present No Question of Due Process of Law.

On pages 171 to 180 of appellant's brief is discussed a subject which may be briefly considered, but which has only a remote (if any) bearing upon any matter here involved. That is the question as to what the statute requires the plaintiff to set forth in the affidavit which is filed with the complaint—whether it requires him to set forth the *details* of his inquiry to discover unknown claimants, or only the fact that any claimants other than those named *are unknown* to him. The question is entirely one of statutory construction, and concerns only the contents of the affidavit. The final result of the California cases upon this subject is that persons whose claims can by reasonable diligence be discovered cannot be sued as "unknown claimants," but that the statute does not require *in the affidavit* a statement of the details of the inquiry made.

In *Title & Document Restoration Co.* vs. *Kerrigan*, 150 Cal., 286, 318, it was held that no one could be sued as an "unknown" claimant who could by reasonable diligence be discovered, and that under the authorities (many of which were cited) a plaintiff could not

> "willfully or negligently close his eyes to the means of knowledge and thus secure a decree by publication and posting alone as against persons whose identity he might have learned by the use of due effort. For the purposes of this statute the adverse claimants

> whom plaintiff 'knows or of whom he has been informed,' include all as to whom he would, by reasonable inquiry, have had knowledge or information."

The Court, however, reserved its decision upon the question whether the statute required the plaintiff to state the facts as to his inquiry *in the affidavit*. In denying a petition for rehearing, a memorandum was added to the opinion, in which it was held that the act required such a statement of facts in the affidavit. Subsequently, it appearing that this question was about to be presented in another case (*Hoffman* vs. *Superior Court*), the language of the memorandum was withdrawn.

The question was then presented to the Court in *Hoffman* vs. *Superior Court*, 151 Cal., 386, and, after due consideration, it was held that the statute does not require a statement *in the affidavit* of the facts showing the inquiry made to discover unknown claimants. An affidavit that they are in fact "unknown" is sufficient. This portion of the opinion is quoted in appellant's brief (pp. 176-178). An equally significant portion of the opinion is *not* quoted in the brief. After holding that the statute did not require that the affidavit show anything except that the party "does not know and has not been informed" of any adverse claimant, the court shows that, in this respect, its provisions are the same as those of other statutes by which constructive service is authorized. It re-affirms the holding in *Title & Document Restoration Co.* vs. *Kerrigan* that good faith and diligence in the discovery of unknown claimants is in fact required, but it points out that the question of what must appear *in the affidavit* depends entirely upon

the language of the statute and that the legislature, in the exercise of its discretion, had power to prescribe the degree and character of proof showing a reasonable necessity for a constructive service of process.

In appellant's brief (p. 178) it is admitted that the Supreme Court of California is correct in its interpretation of the statute, but it is asked—

> "What then becomes of the due process clause of the Federal Constitution; what becomes of the special legislation clause of the State Constitution? It is to be noticed that Mr. Chief Justice Beatty did not concur in the decision of the Hoffman case. Is not the reason obvious?"

We may parallel these rhetorical questions with the answers to them.

The due process clause of the Federal Constitution does not prescribe what *form of affidavit* shall authorize service by publication. If, as is uniformly held, constructive service is permissible as against unknown claimants, such service can certainly be authorized by a legislature on proof by oath of the plaintiff that they are "unknown."

With regard to the "special legislation clause of the State Constitution," it is enough to say that this Court has no concern with it. The courts of the state have held that the act does not violate any provision of its fundamental law.

Title, etc. Restoration Co. vs. *Kerrigan*, 150 Cal., 289;

Hoffman vs. *Superior Court*, 151 Cal., 386;

Lofstad vs. *Murasky*, 152 Cal., 64.

With respect to the suggestion that Chief Justice Beatty "did not concur" in the decision of the Hoffman case, it might be said with equal force that he *did not dissent*. He simply did not participate in the decision.

A review of the cases dealing with statutes providing for service upon unknown claimants shows that in many of them no affidavit whatever is required. In others the affidavit forms no part of the judgment roll. In practically all the same provision exists as that in the statute under discussion.

There is, however, no need for extended discussion upon this point. No provision of the Federal Constitution requires that *any* fact shall appear *by affidavit*. The statute, as construed by the Supreme Court of the State, permits service upon unknown claimants only where in fact the plaintiff has no knowledge of the identity of such claimants. In both of the cases in which the statute was construed in this regard, it was expressly held that a decree rendered against one as an "unknown" claimant, where his interest or identity could have been discovered by the plaintiff with the exercise of due diligence, might be vacated for fraud.

D. The Proceeding Prescribed by the Act is Conclusive Upon Unknown Claimants (Not Only as a Judicial and Binding Determination of Their Rights) But as a Statute of Limitations.

One further consideration suggests itself in connection with the reasonableness of the notice prescribed by the statute. The Illinois "Burnt Records Act," practically identical in its provisions with the act under discus-

sion, was upheld as being "in effect a statute of limitations."

In *Gormley* vs. *Clark*, 134 U. S., 338, Chief Justice Fuller, reviewing the numerous cases in Illinois and a Federal case in which the statute had been sustained, observed that

> "By numerous decisions of the Supreme Court of the State of Illinois it has been determined that a petition to establish title under what is known as the Burnt Records Act need not show that the petitioner was in possession of the land or that it was vacant and unoccupied, as required in a bill to quiet title, the act authorizing the petitioner to make all parties in possession, or claiming an interest in the land, parties defendant to the petition, creating a clear and marked distinction between a case of this character and such a bill * * * that the Statute was in effect a statute of limitations, and under the circumstances was not unreasonable, but demanded as a matter of safety in a great emergency; that it was not open to the objection of unconstitutionality because not providing for trial by jury or otherwise (citing cases) * * *"

See, to the same effect, *Bertrand* vs. *Taylor*, 87 Ill., 235, 238.

With respect to persons sued as unknown claimants, and not actually served, the Illinois act allowed them

> "one year after the entry of such decree within which, upon petition to the Court rendering the same, to have the said decree vacated and set aside in the same manner as is now allowed to defendants under Section 19 of Chapter 22 of the Revised Statutes entitled 'Chancery.'"

In Justice Loring's dissenting opinion in *Tyler* vs.

Judges, 175 Mass., 71, 55 N. E., 812, commenting upon the case of *Shepherd* vs. *Ware*, 46 Minn., 174; 48 N. W., 773, he distinguishes it (without, however, entirely approving it) upon the ground that

> "Any interested party had a year after judgment to appear and have it vacated. It is expressly stated in the opinion that the statute gave to such un-named persons 'the same right to appear and defend before and after judgment' that was given to named defendants who were served by publication; and it appears by Gen. St. Minn., 1894, Sec. 5206, that a defendant brought in by publication could, within one year after judgment, appear and have the judgment vacated if it was wrongly made."

At another point in the opinion Justice Loring concedes that

> "It would be within the constitutional power of the legislature to enact that the effect of some such decree as is provided for in this act, when properly proclaimed and served, should have the effect to put the claimant in possession of the title so set up, and if that possession continue unbroken, and the decree setting up the applicant's title remain in force unmodified for a specified time, all the world should be barred. * * * Such a requirement would practically enable any person to protect his rights of property by an examination of the records of the court of registration made during the specified term, while under this act it is beyond the power of a person to protect his property from the effect of a decree not subject to be reopened and made in his absence without his knowledge."

The Massachusetts Torrens Act, it will be noted, did not allow the decree to be re-opened after its rendition on behalf of one not personally served with process. It

would seem that even Mr. Justice Loring would have regarded the Massachusetts act sustainable as a modified statute of limitations had it provided for the entry of a decree which, within a subsequent specified period, might be vacated on the application of any one not personally served before judgment.

In *Hoffman* vs. *Superior Court*, 151 Cal., 386, 393, Mr. Justice Shaw, speaking for the Court, said:

> "In this connection it is proper to say that in determining whether or not due process of law is afforded, other statutes applicable to the proceeding may be considered. The provisions of Section 473 of the Code of Civil Procedure apply in such cases. Any person interested in the property, and having no actual notice of the decree, may come in at any time within a year after its rendition, and by showing that he has not been personally served with process, and stating facts constituting a good defense to the proceeding—that is, facts sufficient to show that he has a valid adverse interest in the property—he may have the decree vacated as to him and be allowed to answer to the merits." (*Gray* vs. *Lawlor*, 151 Cal., 352.)

In the case cited, *Gray* vs. *Lawlor*, it is held that a party not personally served with summons on applying for a vacation of the decree under the provisions of Section 473 of the Code of Civil Procedure,

> "need not present any excuse for his failure to appear, except the fact that he was not personally served with the summons."

The proceeding prescribed and the decree rendered in it are unquestionably valid and binding upon unknown claimants as a judicial proceeding and decree. As against

unknown claimants, however, the legislature has allowed them to operate with conclusive effect only after the decree has (to use Justice Loring's phrase) been "aided by the subsequent lapse of time" and "remained unmodified for a specific time." The act is valid under any view, but apart from all other considerations it would, like the Burnt Records Act of Illinois, be sustainable upon the mere ground that against unknown claimants not personally served it is

> "in effect a statute of limitations and under the circumstances not unreasonable, but demanded as a matter of safety in a great emergency."
>
> *Gormley* vs. *Clark*, 134 U. S., 338.

IX.

THE PROCEEDING PRESCRIBED BY THE ACT IS JUDICIAL IN CHARACTER AND IS NOT A MERE DECLARATION OF RIGHTS UPON EX PARTE APPLICATION.

The opening portion and indeed the larger part of the brief for appellant is devoted to an elaboration of a claim that the proceeding prescribed by the act of June, 1906, is "non-judicial."

The discussion of this contention in the present brief has been reserved to the last, and this for two reasons. First, because every case heretofore cited which upholds as valid suits against unknown claimants is a complete answer to the contention; and, secondly, because we have desired to present the principles and authorities which conclusively establish the validity of proceedings such as those prescribed by the act, without dissipating the

argument, considering at the same time a claim that such proceedings were "*ex parte*" or "non-judicial."

The suggestion that a proceeding in a court of justice, initiated by a plaintiff against designated defendants, who are summoned to appear and show cause why the relief prayed should not be granted, is either "*ex parte*" or "non-judicial," is perhaps best answered by a statement of the claim itself.

It is impracticable to review in detail the multitude of inapt illustrations and the long list of inapplicable citations with which counsel have sought to fortify the contention. It may, we think, be disposed of on elementary considerations, and by pointing out the absence of all analogy between the point here made and the illustrations of "consultative jurisdiction," "moot questions," "simulated cases," "abstract declarations of law," etc., contained in the brief of counsel.

A. Analysis of the Contention That the Proceeding Prescribed by the Act is Not a Judicial Proceeding.

Before proceeding to a discussion of the contention, let us briefly analyze the argument offered in its support. By what logic do counsel reach the conclusion that a proceeding such as that prescribed by the statute is "*ex parte*," the summons prescribed a mere "solicitation to litigate," and the decree rendered a mere "declaration of rights" binding upon nobody. The argument is this:

1. (a) No complaint can state a "cause of action" unless it alleges that a particular defendant has committed or threatened a violation of the plaintiff's rights.

A court can, therefore, acquire no "jurisdiction" of a defendant unless an initial pleading discloses a controversy between the plaintiff and defendant.

(b) If, then, the complaint does not allege that the defendant has wronged the plaintiff, the Court has no "jurisdiction" to command the presence of any parties defendant, and its summons is no more than a "solicitation to litigate." A defendant so summoned cannot be "compelled" by the process (because "it is not within judicial power to compel one who is not alleged to have done or threatened some wrong"), and has, therefore, the right to disregard the summons and decline the "solicitation to litigate."

(c) If he does not appear to litigate, the rights of the plaintiff are declared "*ex parte.*"

(d) "*Ex parte*" "declarations of right" are not the exercise of "judicial power."

2. (a) The above argument would show the proceeding to be "non-judicial" if regard were had only to the "broadest principles of universal law," but what constitutes "judicial power" is to be "determined in the light of the common law and the history of our institutions as they existed anterior to and at the time of the adoption of the Constitution." This greatly narrows the field of "judicial power," and

(b) Under this narrower view of "judicial power" a court has no power to decide as to "future rights" even though there be a present controversy concerning them.

A number of these points are repeated and re-discussed at various points in appellant's brief while others are

stated without a clear definition of the part they play in advancing the course of the reasoning. The analysis of the argument is, however, we think, inclusive of all the points urged and a fair statement of the reasoning offered in their support.

B. The Contention Involves No Question of "Due Process of Law" Under the Fourteenth Amendment.

It is to be noted at the outset that this contention really involves no question arising under the fourteenth amendment or necessary for determination by this court.

1. The Suggestion That the Proceeding Prescribed by the Act is Not Judicial Concerns Only the Right of the Legislature Under the State Constitution to Confer Jurisdiction Over Such Proceedings Upon the Courts of the State. The Decision of the State Supreme Court That the Proceeding is Strictly "Judicial" is Decisive of This Question.

When urged in the courts of the state it had a proper purpose. The State Constitution distributes the powers of the State Government between the three departments, and prohibits the performance by one of duties properly belonging to another. If the act of June, 1906, conferred "non-judicial" powers on the courts of the State, it was a violation of the State Constitution in this regard, and the contention, however unsubstantial, had at least proper scope in the State courts.

The Supreme Court of California has held in at least two cases directly (and in still a third, in which the same point was urged against the California Torrens Act), that the statute does not violate the State Constitution in this or in any other particular. That decision is conclusive of the question in this court.

In *Reetz* vs. *Michigan*, 188 U. S., 505, a statute was involved which gave to an administrative board the power to decide whether a physician had been "legally registered" under a prior act, and was therefore entitled to practice medicine within the State. It was contended that this called for an exercise of "judicial power." The Supreme Court of the United States said, speaking through Brewer, J.:

> "The decision of the State Supreme Court is conclusive that the act does not conflict with the State Constitution, and we know of no provision in the Federal Constitution which forbids a State from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question. * * * Due process of law is not necessarily judicial process." (Citing numerous cases.)

In *Dreyer* vs. *Illinois*, 187 U. S., 71, 83; 23 Supreme Ct. Rep., 28, 32; 47 L. Ed., 79, 85, it was contended that the provisions of the Indeterminate Sentence Act of Illinois were in conflict with the provisions of the State Constitution in that they conferred "judicial powers" upon a Board of Pardons. Mr. Justice Harlan delivered the opinion of the Court.

> "We will not stop to consider whether the statute is in conflict with the provisions of the State Constitution to which reference is here made. * * * It is only necessary now to say that, even if the statute in question were obnoxious to the objection now urged by plaintiff in error, it would not follow that this Court would review a judgment of the highest court of the State which expressly or by necessary implication sustained it as constitutional. *A local statute investing a collection of persons not of the judicial department with powers that are judicial,* and authorizing them to exercise the pardoning power

which alone belongs to the Governor of the State, *presents no question under the Constitution of the United States. The right to the due process of law prescribed by the fourteenth amendment would not be infringed by a local statute of that character. Whether the legislative, executive and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may in respect to some matters exert powers which, strictly speaking, pertain to another department of the government, is for the determination of the State. And its determination one way or the other cannot be an element in the inquiry whether the due process of law required by the fourteenth amendment has been respected by the State or its representatives when dealing with matters involving life or liberty.* * * *The objection that the act of* 1899 *confers upon executive or ministerial officers powers of a judicial nature does not, in our judgment, present any question under the due process clause of the fourteenth amendment.*"

That the jurisdiction exercised by a superior court in proceeding under the act of June, 1906, is "judicial power" within the meaning of the State Constitution is, therefore, a question which, while at no time doubtful, has been determined by the Supreme Court of the State, and is not here involved.

2. **The Contention That the Proceeding Prescribed by the Act is "Non-Judicial," Rests Upon No Claim That Any Element or Essential of "Due Process of Law" is Denied a Party, But Upon the Suggestion That the Legislature Has No Right to Create a "Cause of Action" for the Discovery and Settlement of Unknown Claims to Real Property.**

Nor is any question of "due process of law" presented.

The essentials of due process of law are "notice and opportunity to defend."

Simon vs. *Craft*, 182 U. S., 427.

Where, in addition to notice and the opportunity to defend, the proceedings are conducted in a court of justice according to the rules of practice and of evidence obtaining under the general law, "due process of law" under any criterion has been afforded.

> "It is not possible to hold that where by the laws of the State the party aggrieved has, as regards the issues affecting his property, a fair trial in a court of justice, according to the modes of proceeding applicable to such case, that he has been deprived of that property without due process of law."

Davidson vs. *New Orleans*, 96 U. S., 97.

There is no need to rediscuss at this point the sufficiency of constructive service of process upon unknown claimants. That has, we think, been already established, but it is, in any event, unrelated to the contention now being considered. *The claim of appellant's counsel, briefly stated, is, that even if a person sued as an unknown claimant should have actual notice of the proceedings, he would be entitled to disregard the summons;* "the existence of the opportunity" (to appear and assert his claim)" *although known to him*, has no effect upon his rights." (Appellant's Brief, p. 10.) In other words, it is urged, that because the State has prescribed an action, the initial pleading in which (it is claimed) does not contain all the essentials of *a common-law "complaint,"* and in which the process, in so far as

it affects unknown claimants, is a citation to appear and defend any claims which they may have, rather than a summons to defend claims which (being known) could be alleged as an actually existent cloud upon plaintiff's title, the defendant may disregard the process.

There is, of course, in these contentions no suggestion of a denial of any right within the contemplation of the fourteenth amendment. There is notice, opportunity to defend and a right to a trial under the "law in its regular administration." A claimant who, relying upon counsel's contention, disregards the summons as one which has no "effect upon his rights," does so not because he is deprived of *notice* of the proceedings, of *opportunity to defend*, or of the *right to a fair trial* according to the practice obtaining in courts of justice, but upon the ground that the allegations of the pleading which the legislature of the State has prescribed as stating a "cause of action" for the discovery and settlement of any adverse claims, show that his claim was unknown, and therefore "no specific wrong is alleged against him."

The plain answer to all this is, that the legislature of a state has a right to prescribe what shall constitute a "cause of action;" and has the right to allow actions against unknown claimants, the *very purpose* of which shall be the *discovery* and settlement of such claims, an unknown claim being an even more dangerous cloud than one which is known. In any event, one who when sued, has notice of the proceedings, opportunity to appear and defend, the right to a fair trial in a court of justice and all the rights that the ordinary course of administra-

tion of law in such courts can afford, has not been deprived of property without "due process of law" under any possible view of the case.

The claim here asserted would have as much force on behalf of an unknown claimant with actual notice of the proceedings as on behalf of one with constructive notice only. This presents no question of "due process of law."

Tyler vs. *Judges of Court of Registration*, 179 U. S., 405, 409, 410.

3. The Fourteenth Amendment Does Not Control the Power of a State to Prescribe the Basis of Relief in Its Courts or the Forms of Procedure Therein.

A state has the right to prescribe the forms of procedure in its courts. It may, if it see fit, authorize the commencement of all proceedings by petition to the Court rather than by complaint against a defendant. It may and *in many jurisdictions does provide for the issuance and service of a summons prior to the filing of any pleading.* It may prescribe the necessary contents of pleadings. It may, in short, control within the widest limits the administrative process of its courts. Matters of procedure are matters of State regulation with which the fourteenth amendment has no concern unless they operate to deny a party the essentials of due process of law—notice, opportunity to defend and a fair trial of the issues involved.

> "The fourteenth amendment does not control the power of a state to determine the form of procedure by which legal rights may be ascertained, if the method adopted gives reasonable notice and affords a fair opportunity to be heard."

Hooker vs. *Los Angeles*, 188 U. S., 314; 23 Sup. Ct. Rep., 395, *397;*

To the same effect see

Iowa Central R. R. Co. vs. *Iowa*, 160 U. S., 389, 393.

"Law in its regular course of administration through courts of justice is due process, and, when secured by the law of the State, the constitutional requirement is satisfied."

Leeper vs. *Texas*, 139 U. S., 462, *468.*

4. The Case at Bar Presents No Question As to the "Judicial" Nature of a Proceeding Under the Act Where There Are No Undisclosed Claimants. Such a Case Can Never Involve a Deprivation of Property.

It will hereafter be shown that the *allegations of the complaint* prescribed by the act invoked and plainly justify the exercise of "judicial power." In so far, therefore, as it is claimed that the proceeding is "non-judicial" because of the absence of particular *allegations in the complaint*, the contention is hereinafter considered. In so far as it is claimed that the proceeding is non-judicial because there may be no "controversy" *in fact* (since there *may* be no persons, known or unknown, claiming any interest adverse to the plaintiff), it need only be observed that this contention can have no relation to the present case and can never present any question of "due process of law."

There either *are* unknown claimants in existence or there *are no* unknown claimants in existence. If *no* persons claim any interest adverse to the plaintiff, *no person is deprived of property* without due process of law or

otherwise. If, on the other hand, there *are* undisclosed claims, then there *is* a cloud upon the plaintiff's title, there *are* adverse parties, there *is* a "controversy," and its determination is unquestionably a proper subject for judicial action.

It was contended in the courts of the State that a proceeding under the act might be maintained even though in point of fact there was no person existing who claimed any interest adverse to the plaintiff, and that in such a case the action was against nobody, but a mere "*ex parte* application" for the "declaration of a right," which nobody disputed. This, it was suggested, was not a judicial function. The Supreme Court of the State held that it was competent for the legislature to prescribe a proceeding for the purpose of establishing the title of plaintiff as a matter of record after notice to all possible claimants, even though in fact there were no adverse claimants.

In the present case, of course, no such question is involved. We are here dealing with a *particular* action wherein there *were* persons who did claim an interest adverse to that of the plaintiff. The only question before this court is whether such persons were bound by the decree rendered.

It is, therefore, to be borne in mind that many questions considered in the opinions of the State Supreme Court (although in every instance decided in favor of the validity of the act) are not here involved. This Court is not concerned with the right of the legislature to confer upon the courts of the State jurisdiction of a proceeding which, under circumstances not here presented, might be

nothing more than a declaration of an undisputed right, nor with the question whether a proceeding to establish title under the act where, in fact, there are no adverse claimants, can be properly said to be "judicial."

5. **The Case at Bar Presents No Question As to the Right of a Court in a Proceeding Under the Act to Determine the Validity of Claims Non-Adversary in Character. The Interests Claimed by Appellant and Appellee Are Adverse and Conflicting.**

One other suggestion in the argument of appellant may be briefly disposed of in the same way. It is urged (pp. 154, 157) that the act under consideration attempts to conclude *non-adversary* interests; that is, it attempts the conclusive determination of the title to real property and the establishment of *all* interests therein, even though certain of such interests be not claimed *adversely to the plaintiff*. We have no doubt of the power of the State to bring "all claimants to any title or interests in the lands before the Court," and make it "the duty of the Court to determine in which of the persons so before it the title is vested," and thus to make the "proceeding a sort of drag-net into which all conflicting claimants of title or interest in the land might be drawn, and where the court, with all parties before it, should determine their respective rights."

Smith vs. *Gage*, 12 Fed., 32.

Such, of course, is the procedure in and the purpose of every one of the Torrens Acts in the different states.

It is sufficient, however, to say that this question is not presented in the case at bar. The interests here concluded *were* interests *adverse* to the appellee. The latter

maintained a proceeding to establish his title to the property involved, and claimed a fee simple absolute therein. The appellant asserts that its grantors were the owners of a reversionary interest. Their rights were adverse to that of the plaintiff in the action, and the case, therefore, presents no question of the power of a court in proceeding under the statute of June, 1906, to determine the validity and establish as matter of record interests not adverse to those of the plaintiff.

C. The Opinions Rendered by the Supreme Court of California Show That the Proceeding Prescribed by the Act is Unquestionably "Judicial."

With these observations the opinions rendered by the Supreme Court of California upholding the validity of proceedings under the act (even in cases where no unknown claimant actually existed) as a proper exercise of judicial power may be briefly reviewed. They are, we submit, a conclusive answer to the contention here urged, and, indeed go further than would be necessary in the case at bar, even if this Court had to determine whether the proceeding here attacked was one which the legislature of California could authorize the courts of that State to entertain.

In *Title, etc. Restoration Co.* vs. *Kerrigan,* 150 Cal., 289, 88 Pac. Rep., 356, 119 Am. St. Rep., 199, Mr. Justice Sloss, speaking for the Court, said:

> "It is strongly urged for the respondent that the 'action' contemplated by the statute is not a judicial but an administrative proceeding. The disposition of such proceeding being by the act conferred upon

the superior court, it is claimed that there is a violation of the provision of the state constitution (art. 3, sec. 1), dividing the powers of government into three departments—the legislative, executive and judicial—and prohibiting the exercise by any one of these departments of functions appertaining to either of the others. It is also claimed as another result from the same premise that to divest property rights by a proceeding which is not judicial is not 'due process of law.'

"To maintain the position that the proceeding is not judicial, the argument is advanced that the jurisdiction of the court is (at least in cases where there is no 'known' adverse claimant) invoked upon a mere allegation of the petitioner's right or title, without any assertion that such right is assailed or disputed by anyone, and that in such cases the decree rendered is a mere declaration of right, made substantially upon an *ex parte* application. It is not to be disputed that, as a general proposition, the judicial function is the determination of controversies between parties, and that the courts will not concern themselves with settling abstract questions of law which may never be involved in an actual dispute regarding property or other rights. Quotations to this effect may be found in a multitude of cases, many of which are cited in the briefs. But it is not to be understood that it is never the exercise of a judicial function for a court to act upon the application of a party who seeks some form of relief, even though at the outset of the proceeding no person is named or designated as opposing the granting of such relief. 'It is certainly clear as a general rule,' says Selden, J., in *Cooper's Case*, 22 N. Y., 67, 'that whenever the law confers a right, and authorizes an application to a court of justice to enforce that right, the proceedings upon such an application are to be regarded as of a judicial nature.' In the present case there is a provision for notice to all persons interested in opposing the plaintiff's application, and an opportunity to them to come in and oppose it.

There are in our law many instances of proceedings which are analogous to the one under discussion, and they have uniformly been regarded as judicial. Thus, we do not question that the superior court exercises judicial functions in granting letters of administration, or admitting a will to probate, or ordering the sale of property of decedents, or determining and declaring heirship, notwithstanding the suggestion made in one of the briefs that probate proceedings are 'administrative.' At any rate, it cannot be denied that such proceedings are judicial, where, in response to the published or posted notice, some person interested appears to contest the application, although at the outset the petition does not, in any of the instances cited, disclose a 'controversy' or an 'invasion of the petitioner's right' in any sense in which such elements are not present in the action brought under the statute now being considered. A petition for change of name (Code Civ. Proc., secs. 1275-1279) discloses neither controversy nor an actual or threatened denial by anyone of petitioner's right, yet such proceeding is judicial: *In re Societe Francaise*, 123 Cal., 525, 56 Pac., 458.

"Indeed, so far as this court is concerned, the question would seem to be foreclosed by the repeated decisions holding the proceeding for the confirmation of the organization of irrigation districts (Stats. 1889, p. 12) to be judicial and properly committed to the superior court for determination: *Cullen* vs. *Glendora Water Co.*, 113 Cal., 503, 39 Pac., 769, 45 Pac., 822, 1047; *People* vs. *Linda Vista Irr. Dist.*, 128 Cal., 477, 61 Pac., 86; *People* vs. *Perris Irr. Dist.*, 132 Cal., 289, 64 Pac., 399, 773; *People* vs. *Perris Irr. Dist.*, 142 Cal., 601, 76 Pac., 381. In *People* vs. *Linda Vista Irr. Dist.*, 128 Cal., 447, 61 Pac., 86, this court adhered to its earlier views regarding the construction and effect of the confirmatory statute of 1889, notwithstanding the suggestion of Brewer, J., in *Tregea* vs. *Modesto Irr. Dist.*, 164 U. S., 179, 17 Sup. Ct. Rep., 52, 41 L. ed., 395, to the effect that the proceeding for confirmation presented a mere moot

case not calling for judicial consideration. But even the acceptance of the views of Justice Brewer would not require us to hold that the proceeding here involved is not judicial. The action or special proceeding now in question is devised, as has been stated, for the purpose of establishing a title which is in fact good but which is not deducible of record. That a court of equity may remedy such a defect by a decree, although there is no actual controversy as to the title, was held in *Sharon* vs. *Tucker*, 144 U. S., 533, 12 Sup. Ct. Rep., 720, 36 L. ed., 532, the Court saying: 'The title of the complainants is not controverted by the defendants, nor is it assailed by any action for the possession of the property, and this is not a suit to put an end to any litigation of the kind. It is a suit to establish the title of the complainants as matter of record, that is, by a judicial determination of its validity, and to enjoin the assertion by the defendants of a title to the same property from the former owners, which has been lost by the adverse possession of the parties through whom the complainants claim': See, also, *Blight's Heirs* vs. *Bankes' Ex'rs.*, 6 T. B. Mon., 192, 17 Am. Dec., 136. And this court has held that, in an action to quiet title under sections 738 and 739 of the Code of Civil Procedure, the absence of a finding that the defendants asserted a claim adverse to the plaintiff is immaterial: "*Bulwer Con. Min. Co.* vs. *Standard Con. Min. Co.*, 83 Cal., 589, 23 Pac., 1102. 'Even though the defendant makes no adverse claim,' says the Court, 'third persons may regard plaintiff's title as being subject to an adverse claim by the defendant which would be a cloud upon plaintiff's title, depreciating its value, and which he would be entitled to have removed by the decree of the court.' The action here involved may well, as claimed by petitioner, be regarded as a suit to remove a cloud upon titles, the legislature having power to declare what shall form such cloud (*Clark* vs. *Smith*, 13 Pet., 195, 10 L. ed., 123), and having in effect de-

clared by this statute that the destruction of public records constitutes a cloud upon title.

"Again, it will be observed that in other states statutes providing for the determination of titles under the Torrens system by administrative officers, have been assailed and declared void upon the ground that the power of determining such titles was essentially judicial and to be exercised only by the courts: *People* vs. *Chase*, 165 Ill., 527, 46 N. E., 454, 36 L. R. A., 105; *State* vs. *Guilbert*, 56 Ohio St., 575, 60 Am. St. Rep., 756, 47 N. E., 551, 38 L. R. A., 519. The same view as to the nature of such functions was taken in *Tyler* vs. *Judges of the Court of Registration*, 175 Mass., 71, 55 N. E., 812, 51 L. R. A., 433; *People* vs. *Simon*, 176 Ill., 165, 68 Am. St. Rep., 175, 52 N. E., 910, 44 L. R. A., 801; *State* vs. *West-Fall*, 85 Minn., 437, 89 Am. St. Rep., 571, 89 N. W., 175, 57 L. R. A., 297.

"The argument, advanced with much force and ability, that even a judicial proceeding cannot divest property rights, in the absence of an allegation of a controversy between parties to the record, may be viewed as a restatement, in another form, of the objections to statutes authorizing judgments against 'unknown owners.' This contention, if adopted, would require us to hold that, except in proceedings strictly *in rem*, no statute can constitutionally authorize valid judgments as against persons not ascertained or made parties defendant by name or other specific description."

The same argument was presented in the attack made upon the Torrens Act of California, in

Robinson vs. *Kerrigan*, 151 Cal., 40, *46*.

Mr. Justice Shaw, who delivered the opinion, after affirming the views laid down in *Title, etc. Restoration* Co. vs. Kerrigan, 150 Cal., 289, upon this point, said:

"The proposition here that the proceeding is

judicial and not administrative, that it is properly a matter for the judicial department, was also fully considered and established in *Title, etc. Restoration Co.* vs. *Kerrigan*, 150 Cal., 289, 119 Am. St. Rep., 199, 88 Pac., 356, 8 L. R. A. (N. S.), 682, and the reasons there given apply here.

"The claim on behalf of the defendant in this particular seems to be based on the theory that there is or may be no adverse party to the proceeding; that it may be had where there is in fact no adverse claim, lien or encumbrance to or upon the land, and hence that it is not adversary in character. That it may not become adversary in this sense is of course conceded. It would not necessarily follow that the proceeding was not judicial. It needs no citation of authorities to establish the proposition that the power of a court to entertain an action does not depend upon the appearance of the defendant and his active opposition to the claims of the plaintiff.

"The contention is further made in this connection that judicial power can be exercised only to settle existing disputes and controversies, and that, if none exist, the act of merely describing and declaring an undisputed title is necessarily administrative and cannot be performed by the judicial department. This argument does not fully meet the case. It may be admitted that the existence of controversies which could not be settled by the interested parties, and the necessity of some other means of determining such controversies, were the primal causes for the institution of courts with power to adjudge between the parties to the strife, and, consequently, that originally the exercise of judicial power implied the existence of an actual present controversy to be determined. But the refinements of civilized life and the necessity for the orderly regulation, determination and protection of human affairs and rights of property have long required the extension of the judicial power beyond the settlement of controversies which have actually arisen, so as to include the

function of providing security against disputes and claims which may arise. Hence, in modern times, the power of the courts may be, and often is, exerted to protect property and rights from possible, though at the time unknown, hostile claims and pretensions, or to merely declare a status, or right, and thereby to forestall and prevent controversies which, but for the judicial declaration, might arise in the course of future transactions or proceedings. In the case provided for by the McEnerney Act, the total destruction of all the public records and muniments of title had endangered all real property, had exposed land titles to any sort of false claims, and had made it impossible for any landowner to prove or exhibit his title in the usual manner, if he wished to dispose of or mortgage his land or defend his title in court. It therefore became necessary to provide for the establishment of a new record title. In the case of the Torrens law the plan for a new method of registering and transferring titles made it necessary that the absolute title should first be established and declared. In each case a status, or right, was to be established, declared and made conclusive, as the foundation for subsequent proceedings and transactions. This was a sufficient cause for placing the property to be thus affected within the jurisdiction of the court as a *res*, the ultimate right and title to which could be there adjudicated, after reasonable notice to all possible claimants to appear and assert their claims. Whether or not this is strictly an exercise of judicial power, as originally instituted, it cannot be denied that it is a power of the class which, from time immemorial, has been committed to and exercised by the courts. At the time the constitution was adopted, this class of powers had long been usually exercised by the courts alone. It must be presumed that in providing therein for the division of governmental power into three departments, legislative, executive and judicial, and declaring that no person charged with the exercise of the powers belonging to one of them should exercise

functions appertaining to either of the others, this usual power of the courts was in mind, and that it was intended that the courts should continue to exercise these *quasi-judicial* powers, as they had previously been accustomed to do. A law which merely creates a new occasion and provides a new procedure for the exercise of this power cannot be said to transgress this clause of the constitution.

"Furthermore, in such matters, there is always a possibility that there may be a hostile claim or dispute as to the right to be established. If it were necessary to find further justification for classing this power as judicial, this circumstance would be sufficient. A hostile claim being possible, there is, in contemplation of law, an adverse claim to be settled, a right to be protected against the possible claimant, for which a judicial decree is the only practicable and effective remedy."

Again in *Hoffman* vs. *Superior Court*, 151 Cal., 386, it was urged that the act of June, 1906, imposed upon the Superior Court non-judicial functions. Mr. Justice Shaw said:

"It is again contended here, as in a former case, that courts have no power to adjudge unless there is an actual controversy; that title to real property cannot be quieted until it has been questioned; and hence that the proceeding is purely administrative or ministerial and not a judicial function, and that therefore the statute is an unauthorized delegation of administrative power to the judicial department of the State. This objection also was considered in the former case of *Title, etc. Co.* vs. *Kerrigan*, 150 Cal., 289. It was further considered again and held to be unfounded in *Robinson* vs. *Kerrigan*, 151 Cal., 40. For a full discussion of the question, as also the various objections urged upon the present hearing, we refer to the opinion in those cases."

At the risk of possibly unnecessary repetition, it should again be pointed out that in the case at bar it is admitted that there were in fact undisclosed claims, and the decree, so far from being attacked as a mere declaration of an undisputed right, is attacked because it did determine the title of the plaintiff in the action as against actually existing adverse claims here represented by appellant.

D. The Use of Quotations From Authorities in the Brief for Appellant.

Before considering in its details the position taken by appellant, something should be said concerning the use of quotations from cases in appellant's brief.

In most instances the classes of cases quoted are grouped in the brief, or their facts are stated so that even though the language in the quotation itself may have been carefully selected, the court can see that it was originally addressed to an entirely different point than that presented in the case at bar. There are, however, instances where expressions originally applied to one point are used in the brief in support of quite another, without any reference to the connection in which the language was employed.

> "It is always unsatisfactory to abstract altogether the reasoning of the court in any reported case from the facts to which this reasoning is meant to apply. *This has a tendency only to misrepresent one judge and mislead another.*"
>
> Lord Manners in *Revel* vs. *Hussey*, 2 Ball and B., 286 (quoted in *In re Johnson*, 98 Cal., 531, 542).

When, however, language is not only quoted without reference to the case in which it was uttered, but its qualifying phrases are omitted, or sentences are broken and deprived of their context, the danger of relying upon the quotation without an examination of the original case becomes apparent.

It is impracticable for us to review and distinguish in this brief all of the cases from which quotation is made in the brief for appellant. For that reason, we shall at this point illustrate by a few instances the danger of accepting such quotations as enunciating a principle applicable to the present case, or even as truly representative of the cases from which they are taken. Pages 22 and 23 of appellant's brief are devoted to four quotations, which may be used as examples. In the brief they are employed to show that judicial power "cannot exist apart from a controversy."

The first of these cases is *Georgia* vs. *Stanton*, 6 Wall., 50. Two sentences only are quoted with signs of omission between them. We here reproduce these sentences with enough of the context to illustrate our point, the language *omitted* by opposing counsel being in heavy type. The case was one in which a bill in equity had been filed by the State of Georgia to enjoin the Secretary of War and other federal officers from carrying into execution certain acts of Congress which it was claimed would abolish the existing State Government and establish another. *The Court held that the case called for a decision upon a political question*, and said, referring to the right of the federal government to proceed by injunction:

> **"But, according to the course of proceeding under this head in equity, in order to entitle the party to the remedy,** a case must be presented appropriate for the exercise of judicial power. The rights in danger, as we have seen, must be rights of persons or of property, **not merely political rights which do not belong to the jurisdiction of a court either in law or equity * * * That these matters, both as stated in the body of the bill and in the prayers for relief, call for the judgment of the court upon political questions and upon rights, not of persons or property, but of a political character, will hardly be denied; for the rights for the protection of which our authority is invoked are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a state, with all its constitutional powers and privileges.** No case of private rights or actual property infringed or in danger of actual or threatened infringement is presented by the bill in a judicial form for the judgment of the court."

The other three cases cited well illustrate how "unsatisfactory" it is to "abstract altogether the reasoning of the Court in any reported case from the facts to which this reasoning is meant to apply" and how easily this may "misrepresent one judge and mislead another."

In one (*DeCamp* vs. *Archibald,* 50 Ohio St., 618; 35 N. E., 1056) the Court had under consideration the validity of a statute *permitting a notary to punish a witness for contempt* on the taking of a deposition. It was held that this power might be conferred upon notaries without a violation of the State constitutional provision relating to the separation of governmental powers.

In the next case (*In re Canadian Northern Ry.,* 7 Fed., 653), the question involved was whether a court could *fix the rates to be charged in the future by a railroad*

company for the use of a bridge. This was held to be judicial and not legislative power.

In the last of the cases (*Brewington* vs. *Lowe,* 1 Ind., 2148; Am. Dec., 349), the Court refused to take cognizance of a suit *which both parties admitted to be fictitious.*

It is plain that in none of these cases was any point, at all analogous to that here suggested, present to the mind of the Court.

> "It is a maxim never to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions were used. * * * The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. The principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."
>
> Chief Justice Marshall in *Cohens* vs. *Virginia,* 6 Wheat., 264.

E. While it is Unnecessary for This Court to Consider or Determine Whether Proceedings Under the Act Here Involved Are "Judicial" Within Any Rule as to the Separation of Governmental Powers, There Can Be No Doubt That They Are Essentially and Strictly Judicial in Character.

The case at bar involves the meaning of "due process of law" rather than any consideration of the extent of "judicial power." In view, however, of the suggestion that a proceeding under the statute of June, 1906, is non-judicial, and in view of the numerous cases by which counsel in their brief seek to show that "judicial

power'' can be exercised only when invoked by a complaint wherein one party contending with another alleges that the latter has ''done or threatened some wrong,'' it is not amiss to show that ''judicial power'' covers every proceeding and includes within its bounds the exercise of every function necessary *to adjudicate upon the rights of a party who prosecutes a claim for his lawful rights before a court.*

1. **Definitions of ''Judicial Power'' and Judicial Proceedings.**

Actions and suits are defined in almost innumerable cases as *''the lawful demand of one's rights in the form given by law;''* as *''nothing else than a demand at law of one's rights;''* as *''any proceeding in a court for the purpose of obtaining such remedy as the law allows a party under the circumstances;''* as *''extending to any proceeding in a court of justice seeking a remedy which the law affords and to any legal application to a court of justice.''*

Johnston vs. *Commonwealth,* 1 Bibb., 598;
State vs. *Newell,* 13 Mont., 302, 34 Pac., 28;
People vs. *Rensellaer County Judge,* 13 How. Pr., 398;
McBride's Appeal, 72 Penn. St., 480;
Jacoby vs. *Shafer,* 105 Penn. St., 610;
Cohens vs. *Virginia,* 6 Wheaton, 407;
Marion vs. *Ganby,* 68 Iowa, 142; 26 N. W., 40;
Harris vs. *Phoenix Insurance Company,* 35 Conn., 10.

These definitions of ''actions'' and ''suits'' relate, of course, to those words in a general sense, and without distinction between *ordinary* remedies and *special pro-*

ceedings, or between the forms of actions at law and suits in equity. They show, however, that proceedings to be "judicial" in character need only be applications before a court of justice for remedies which the law affords. "Judicial power" and "judicial action" have equally wide scope of meaning.

The judicial power conferred upon the courts of the United States, says Mr. Chief Justice Marshall, in *Osborne* vs. *U. S. Bank*, 9 Wheaton, 738, 819,

> "enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States when any question respecting them shall assume such form that the judicial power is capable of acting on it. That power is capable of acting only *when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case*, and the constitution declares that the judicial power shall extend to all cases arising under the constitution, laws and treaties of the United States."

In *Ex Parte Milligan*, 4 Wallace, 2, it was contended that an application for a writ of *habeas corpus* did not become a "cause" until two parties were before the court. Mr. Justice Davis says:

> "But, it is argued, that the proceeding does not ripen into a cause until there are two parties to it. This we deny. It was the *cause* of Milligan when the petition was presented to the Circuit Court. It would have been the *cause* of both parties if the Court had issued the writ and brought those who held Milligan in custody before it. Webster defines the word '*cause*' thus: 'A suit or action in court; any legal process which a party institutes to obtain his demand, or by which he seeks his right, or supposed right'—and he says 'this is a legal, scriptural, and

popular use of the word, coinciding nearly with case, from *cado*, and action from *ago*, to urge and drive.'

"In any legal sense, action, suit and cause, are convertible terms. Milligan supposed he had a right to test the validity of his trial and sentence; and the proceeding which he set in operation for that purpose was his 'cause' or 'suit.' * * * But the true meaning of the term 'suit' has been given by this Court. One of the questions in *Weston* vs. *City Council of Charleston* (2 Pet., 449) was whether a writ of prohibition was a suit; and Chief Justice Marshall says: 'The term is certainly a comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords him.' Certainly, Milligan pursued the only remedy which the law afforded him.

"Again, in *Cohens* vs. *Virginia*, he says: 'In law language a suit is the prosecution of some demand in a court of justice.' Also 'To commence a suit is to demand something by the institution of process in a court of justice; and to prosecute the suit is to continue that demand.' When Milligan demanded his release by the proceeding relating to *habeas corpus*, he commenced a suit; and he has since prosecuted it in all the ways known to the law."

"Judicial act" has been defined in terms equally broad. Distinguishing such an act from one of legislation it is said:

"Wherever an act undertakes to determine a question of right or obligation or of property upon which it proceeds, such act is to that extent a judicial one, and not the proper exercise of legislative functions."

People vs. *Board of Education*, 54 Cal., 375;

Field, J., in *Sinking Fund Cases*, 99 U. S., 761;

Smith vs. *Strother*, 68 Cal., 194;

Wulzen vs. *Supervisors*, 101 Cal., 15.

"Judicial power," it is said in *Grider* vs. *Tully*, 77 Ala., 424,

> "is authority vested in some court, officer, or person to hear and determine when the rights of persons or property, or the propriety of doing an act are the subject-matter of adjudication."

In *Hereford* vs. *People*, 197 Ill., 222, 64 N. E., 310, 312, a judicial proceeding is defined as one

> "which takes place in or under the authority of a court of justice, or which relates in any way to the administration of justice, or which legally ascertains any right or liability."

"This much may be safely said," says the Supreme Court of Colorado, in *Morton* vs. *Simpkins*, 20 Colo., 438, 38 Pac., 1092,

> "when a regularly constituted court of justice is clothed with authority to hear and determine a question of fact, or a mixed question of law and fact, upon evidence, written or oral, to be produced before such court, and thereupon to render a decision fixing the material rights or interests of one or more persons or bodies corporate, such proceedings by the court must be regarded as judicial and the decision by the Court may properly be denominated a judgment."

2. **"Special Proceedings" as Well as "Actions" Are "Judicial Proceedings."**

It is contended in the brief for appellant that judicial power can be exercised only in a proceeding *inter* parties with a plaintiff on the one hand, a certain defendant upon the other, and an allegation of a right in the plaintiff and a wrong by the defendant.

If so, justice can only be administered in *actions*. Special proceedings, then, are the exercise of non-judicial power, and the legislatures and courts of every State in the Union have for decades been violating fundamental principles of constitutional law without suspicion of the fact. In an exhaustive study of the cases dealing with judicial power we have yet to find one in which a court has held or intimated that a proceeding in a court of justice instituted by a petition alleging the plaintiff's right, and in which, after citation or summons to all parties adversely interested, a decree is rendered determining that right, is an exercise of a "non-judicial" function.

We have said that if counsel's position were correct, justice could only be administered in an ordinary proceeding in the form of an *action*. The Code of California, like that of practically every State under the reform procedure, defines "judicial" remedies to be

> "such as are administered by the courts of justice or by judicial officers empowered for that purpose by the constitution and statutes of this State,"
>
> C. C. P. Cal., Sec. 20,

and divides them into two classes, *actions* and *special proceedings*.

> C. C. P. Cal., 21.

An *action* is defined as

> "*an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.*"
>
> C. C. P. Cal., 22.

A civil action is one

> *"which is prosecuted by one party against another for the enforcement or protection of a right, or the redress or prevention of a wrong."*
>
> C. C. P. Cal., 30.

According to the argument of counsel this is the *only* form in which judicial power may be exercised. What, then, becomes of special proceedings, classified as *"judicial"* remedies and distinguished from *actions?* Such special proceedings include "every other remedy." Do counsel contend that special proceedings are not the exercise of "judicial power," or that they are the exercise of "judicial power" only when instituted by a *complaint* which alleges the plaintiff's right and asserts a violation of that right by a certain defendant? If so, what is to be said of the numerous cases, which will readily occur to the mind of any one familiar with procedure under the codes, wherein the proceeding is instituted by *petition to the court* and not by *complaint against any defendant:* in which the allegations of the petition are merely the assertion of a right in the petitioner, without an allegation of any wrong by any defendant and in which the decree proceeds, after citation to the world, to adjudicate upon the right claimed or to afford the remedy sought by the applicant? We shall, hereafter, note many instances of proceedings in which all of these elements concur and which, if beyond the scope of judicial power, have never been so considered.

3. The Power Here Claimed to Be "Non-Judicial" Has in Every Other Case Been Held or Assumed to Be So Strictly "Judicial" That It Could Be Vested Only in a Court.

Statutes authorizing proceedings against unknown claimants have been before the courts in many cases—in how many may be judged from the number of authorities cited under the preceding main heading of this brief. It is believed that no court has ever been called upon to seriously consider quite so casuistical a contention as that here urged.

Every case which upholds proceedings against defendants described as unknown owners, is a conclusive answer to it. The authorities sustaining the validity of the Torren Acts, the innumerable cases upholding statutes providing for proceedings against unknown owners in suits to quiet title, in suits for partition, to confirm tax titles, in escheat, etc., deprive the argument of even plausibility. Every proceeding initiated by petition (as distinguished from complaint) and prosecuted by citation (as distinguished from summons) involves the same considerations and elements which counsel urge as rendering this proceeding "*ex parte*" and "non-judicial."

The Torrens system of land registration has been adopted by statute in at least six States of the Union. In Oregon the validity of the statute has not been judicially determined. In Illinois the first statute of this kind was held to be unconstitutional *as conferring judicial powers upon administrative officers*, in

People vs. *Chase*, 165 Ill., 527; 26 L. R. A., 105.

The later Illinois statute obviated this objection and was upheld in

People vs. *Simon*, 176 Ill., 165; 44 L. R. A., 801.

In Ohio the statute was declared unconstitutional for several reasons, one of them being that it did not prescribe due process of law as to known claimants; another being *that it attempted to delegate judicial functions to non-judicial officers.*

State vs. *Guilbert*, 56 Ohio St., 575; 47 N. E., 551; 60 Am. State Reports, 756.

In Massachusetts the act was sustained in *Tyler* vs. *Judges of the Court of Registration, being held to vest none of the judicial power of which it required the exercise in non-judicial officers.*

175 Mass., 71; 55 N. E., 812; 51 L. R. A., 433.

In Minnesota this same objection to the statute (that it delegated judicial functions to non-judicial officers) was made, but the statute was sustained in

State vs. *Westfall*, 85 Minn., 437; 89 N. W., 175.

That the Colorado statute is valid was determined in

People vs. *Chrissman*, 92 Pac. (Colo.), 949.

All of these statutes make provision for an initial decree establishing the title of plaintiff *as against the world.* All of them necessarily involved the features which it is claimed render the statute now under review obnoxious because of its lack of "controversy," "parties," and "cause of action"; yet in all of them there is

not the slightest expression of a doubt that the exercise of judicial power is involved, nor the slightest intimation that such a proceeding cannot be administered by a court of justice.

The two cases in which statutes of this class were held unconstitutional went either wholly or in part upon the ground that the power exercised in the proceeding was *essentially judicial and that an attempt to confer it upon other than judicial officers was an unconstitutional delegation of judicial power.* The only case in which anything approaching the argument which is here made was noticed is the Minnesota case of *State* vs. *Westfall*, where the brief of counsel for petitioner made use of a catch-phrase employed by counsel for appellant in their brief, and urged that the legislature could not make the Court "a registration office." The hospitality which the Court gave to this suggestion is illustrated by the number of words it took to dispose of it:

> "Nor does the act attempt to make the Court a registration office as relator claims. It simply confers upon the Court certain judicial duties incident to the plan of registering land titles provided by the act." (Quoted in
>
> *People ex rel. Smith* vs. *Chrissman*, 92 Pac. (Colo.), 949.)

4. A Complaint Under the Statute Does State a "Cause of Action."

The basic fallacy of counsel's contention is its premise —that because courts of justice are instituted to determine "controversies" between parties, a court has no power to compel the attendance of anyone who is not

alleged to have done a wrong to the plaintiff, or (to use counsel's phrase)

> "It is not within judicial power to compel one who is not alleged to have done or threatened some wrong." (Appellant's Brief, p. 15.)

There is no need to pause at this point to show that every suit against unknown claimants is in effect a suit to remove a cloud from title—a cloud which *actually* exists (and therefore infringes a right of plaintiff), if the claimants do exist, and which cannot deprive anybody of property without due process of law if such claimants do *not* exist. Nor need we stop to consider the numerous cases upholding the validity of proceedings in which a remedy strictly analogous to that provided by the statute under discussion was involved. The suggestion that the process of a court can be disregarded by one to whom it is directed, because a pleading does not allege that he has wronged the plaintiff, may be even more easily and more briefly disposed of.

Let us leave out of view for the moment the fact that there may be no one who does actually claim an interest in the property adverse to the plaintiff. Wherever this fact is present, as we have repeatedly pointed out, no one is deprived of property. The case here under consideration is a case in which there *are* adverse claimants who are unknown to the plaintiff. In every such case the proceeding is one wherein such unknown claimants are sued by general designation, wherein the plaintiff does seek relief against adverse parties, wherein there is in fact a controversy, and where the action is nothing more nor

less than a suit to quiet title against actually existing but undisclosed adverse claims.

This would sustain the proceeding as "judicial" under the most limited definition of the term; but there is a large class of judicial proceedings wherein the power of a court is invoked by petition, in which the plaintiff sets forth merely his own right, and asks its establishment after citation to all who may be adversely interested, to appear and show cause, if any they have, why the relief should not be granted. This is the form of nearly every special proceeding under Code practice. The instances of such proceedings, given in the opinion of Mr. Justice Sloss in *Title & Document Restoration Co.* vs. *Kerrigan,* 150 Cal., 319 *et seq.*, are sufficient to show both their number and their unquestionably judicial character.

Is a party entitled to treat the summons of a court as a mere "solicitation to litigate" (to be accepted or declined with equal safety) whenever he is "not alleged to have done or threatened a wrong," because no "cause of action" has been stated against him?

We may leave out of view the fact that this assumes that there is no "cause of action" where the legislature has declared there is. We may disregard likewise the settled principle that a court has power to determine whether the pleadings state a "cause of action," and that it is in the exercise of "jurisdiction" in so doing, so that its decree, however erroneous, will not be void or even voidable except by appeal.

The fallacy of the suggestion lies even deeper. A court has power to summon and compel the appearance of any person who is impleaded as a party or whose rights may

be affected by the relief asked. Such person may, it is true, disregard the summons, but if he do so and the decree foreclose his rights, he cannot be said to have been deprived of property without due process of law.

The distinction is elementary between necessary parties and proper parties in equity. Those are necessary parties against whom relief is asked. According to the contention of plaintiff they are the only persons who could possibly be bound, and as to all others the process of the court would be a "mere solicitation to litigate." Yet equity frequently requires the joinder of persons against whom nothing has been alleged and who are not sued as having violated any right of the plaintiff, on the mere ground that although not parties to the "controversy," they may be interested in the suit, and their rights may be affected by the decree. It has never, we believe, been suggested that such persons are entitled to treat the process of the court as a nullity upon the ground that "it is not within judicial power to *compel* one who is not alleged to have done or threatened some wrong."

An "action," we have seen, is defined to be "the lawful demand in a court of justice of one's right in the form given by law." A pleading which states such demand, therefore, states a "cause of action." A pleading which sets forth the demand of a petitioner, with the allegations required by the very statute which creates the right to the remedy demanded, certainly states a "cause of action," "a demand of one's rights in the form required by law," if a legislature has any power at all to provide what shall entitle a party to judicial relief.

The argument that a complaint framed in accordance with such a statute, its form prescribed by that statute, states no "cause of action" is, in effect, an assertion that the power which creates the remedy cannot prescribe what shall entitle a party to pursue it.

In *Whiting* vs. *Townsend*, 57 Cal., 515, the Court had under consideration a section of the street law of 1872, which prescribed the contents of a complaint in an action for the recovery of street assessments. It was contended that a complaint framed in accordance with the statute stated no "cause of action," and that the legislature in attempting to prescribe what the complaint should contain in order to state a cause of action had usurped judicial functions. Morrison, C. J., delivered the opinion of the Court:

> "The first objection we will notice is to the sufficiency of the complaint. The pleading on behalf of the plaintiff in this proceeding is regulated by Section 13 of the Act of April 1, 1872, and it is therein provided what facts the complaint must contain. The complaint in this case was sufficient under that section of the statute and must be so treated by the Court. It is claimed that when the legislature undertook to provide a rule of pleadings for this class of cases it usurped judicial functions, and the act is therefore void. We cannot concur in this conclusion. *All the rules of pleadings in this State are prescribed by legislative acts. The Code of Civil Procedure determines what facts shall be stated in a complaint and how they shall be stated;* what objections may be taken by a demurrer, and how they shall be taken; and if not taken, the Code provides that many—nearly all of the enumerated objections shall be waived. It is unnecessary to enlarge upon this point in the case. The matter of pleadings, it must be conceded, is a proper subject for legislative regulation."

5. **The Legislature Has Declared That the Destruction of Records Casts a Cloud Upon the Title to Property and Has Here Provided a Proceeding for the Removal of That Cloud. The Complaint States a "Cause of Action," as in Any Suit to Remove a Cloud From Title.**

While considerations already discussed sufficiently answer the suggestion that the complaint in a proceeding under the act of June, 1906, states no cause of action, it may be pointed out that it does state a "cause of action" in the same manner as does a complaint in any suit to remove a cloud from title. If we treat the proceeding as one which, in substance and effect, is a suit to remove a cloud, that cloud exists not because of any known claim held by a particular defendant, but because records which have for years stood as the public assertion of that title, and as the means of establishing its validity againt *all persons*, have been destroyed. The basis of all proceedings in equity to remove clouds from title is that the owner of the property would, in case of a future controversy, be required to offer extrinsic proof of the invalidity of the claim asserted.

6 Am. & Eng. Encyc. of Law (2d Ed.), 150.

The State legislature has, by the act under consideration, declared in effect that the destruction of public records casts a cloud upon the title to property evidenced by those records. That the legislature had power so to declare cannot be doubted.

> "Kentucky has the undoubted power to regulate and protect individual rights to her soil *and declare what shall form a cloud on titles*, and having so declared, the courts of the United States, by removing

such clouds, are only applying an old practice to a new equity created by the legislature having its origin in the peculiar condition of the country."

Clark vs. *Smith*, 13 Peters, 195.

California, then, has declared that the destruction of public records throws a cloud on title, and has provided a means for removing such cloud in the statute now under discussion. It has further provided that an allegation of the destruction of such records is a sufficient allegation of that cloud, and under this statute, as under the Burnt Records Act of Illinois, has made the allegation of such destruction sufficient to confer jurisdiction upon the Court without an averment that titles other than that of the plaintiff are invalid.

Gage vs. *Gentzel*, 144 Ill., 450; 33 N. E., 536.

6. **Even in an Ordinary Suit to Quiet Title the Allegation That the Defendant Has Made an Adverse Claim Has No Purpose Except to Compel the Production of Such Claim if it Exists, and a Denial of the Allegation is Immaterial.**

When the claim here urged is analyzed, it is found to rest upon nothing more substantial than the fact that as to claims which are unknown to the plaintiff, the complaint does not state (and, of course, cannot state) that such adverse claims do in fact exist. The very purpose of the suit is to compel a disclosure of such claims and to obtain an adjudication and settlement of them.

It is worthy of note, therefore, that even in an ordinary suit to quiet title, the allegation of an adverse claim by the defendant has no purpose except to apprise him of the nature of the action. The plaintiff is not required to set

out the nature of a defendant's claim even in an ordinary suit to quiet title or to remove adverse claims, and the only purpose of such an allegation is to challenge the production of an adverse claim if it exists.

Hyde vs. *Redding*, 74 Cal., 493;
Otis vs. *De Boer*, 116 Ind., 531; 19 N. E., 317;
Carver vs. *Carver*, 97 Ind., 497, 503.

Nor is the allegation traversable.

The Supreme Court of California has held, when dealing with the ordinary suit to quiet title, that

> "*Even conceding* that the averment of an adverse claim is *necessary* in a complaint to quiet title,"

a denial by the defendant that he had made such a claim would be immaterial.

> "The denial of it is immaterial, since the decision of it either way cannot affect the judgment."
>
> *Bulwer* vs. *Consolidated Mining Co.*, 83 Cal., 589.

That case involved an action under Sections 738 and 739 of the Code of Civil Procedure to determine an adverse claim to certain mining property. The answer of the defendant *denied that it had ever made such adverse claim.* The Court says (page 598):

> "It is true that it denies that it ever made any such adverse claim; but in view of section 739 of the Code of Civil Procedure, this issue, in connection with the disclaimer by the defendant, is immaterial, since a decision of it either way would not affect the judgment; that is to say, when, in an action to quiet title to land, the defendant disclaims any interest or estate in the premises, it is immaterial whether or not he had ever before claimed an interest or

estate therein adversely to the plaintiff; for in either event the plaintiff would be entitled simply to a judgment quieting his title, *without costs.* * * * (Page 608.)

"1. Counsel for appellant claim that the findings of fact do not support the conclusions of law or the judgment, 'in that there is no finding to the effect that the defendant asserted a claim adverse to plaintiff to any part of the property described in the complaint, or to the ledge in dispute, before the commencement of the action,' and thence concludes that 'the judgment should be against the plaintiff, and in favor of the defendant.' But, as above shown, this conclusion does not follow, even if it is true that there is no such finding. Conceding that the averment of an adverse claim is necessary in a complaint to quiet title under section 738 of the Code of Civil Procedure, yet, if the defendant, in his answer, claim an adverse interest or estate in the land described in the complaint, a denial that he had made such adverse claim before the commencement of the action would be immaterial. If, on the other hand, the defendant, as here, expressly disclaim any estate or interest in the land described in the complaint, and at the same time deny that he ever made any such adverse claim, the plaintiff would still be entitled to a decree quieting his title, but without costs. This is implied in section 739 of the Code of Civil Procedure. *The object of Sections 738 and 739 is to enable the plaintiff, in such action, to dispel whatever may be regarded by third persons, as well as by the defendant, as a cloud upon his title; for, even though the defendant makes no adverse claim, third persons may regard plaintiff's title as being subject to an adverse claim by the defendant, which would be a cloud upon plaintiff's title, depreciating its value, and which he would be entitled to have removed by the decree of the Court; so that his record title may appear perfect, not only to the defendant, but to all persons whom it may thereafter concern.*

The only purpose of the averment of an adverse claim is to notify the defendant of the nature of the action, and that he is required to set forth and litigate any adverse title he may claim to have, or to disclaim any such adverse title, either expressly or by default."

Does the jurisdiction of the Court in such a case rest on an allegation which no party can deny, or the denial of which is immaterial? Has the legislature no power to dispense with an averment which cannot affect the judgment? Do "judicial power" or "due process of law" depend for their existence on nothing more substantial than the legislative requirement of an immaterial allegation in a pleading?

7. The Cause of Action Stated in a Complaint Under the Act is Analogous to That in an Equitable Suit to Restore a Lost or Destroyed Instrument.

The jurisdiction of equity to entertain suits for the restoration of lost and destroyed instruments is of ancient origin. In such suits all that is alleged (at least as against any person other than the maker of the instrument) is the loss or destruction of the instrument, its contents are stated and the remedy prayed is a re-establishment of it. The proper defendants are not only those who executed the instrument, but all interested in the property covered by it or whose rights might be affected by its re-establishment. The statute now under discussion is nothing more than a statutory provision for the restoration of public records in a proceeding in which all persons interested in the property involved are made defendants for the purpose of protecting such interests in the land as they

may have, in which adverse claims may be settled and in which those whose claims are unknown may be compelled to disclose and submit them to a court for adjudication and settlement.

> "It is true that under this act a defendant may be compelled either to say that he claims no interest in the property or to state fully just what his claim is; but this is no hardship; for if he has no claim, he ought to say so, and if he has, it cannot harm him merely to state in his own way what it is. At all events the provision in question is a valid exercise of legislative power."
>
> *Miles* vs. *Strong*, 68 Conn., 273; 36 Atl., 55, 59.

8. Under the Act, All Claimants in the Property Are Defendants and Parties to the Action, Whether They Appear or Suffer a Default. The Summons is Not a Mere "Solicitation to Litigate."

The suggestion that a summons which orders a party to appear and defend, or be foreclosed of his rights, is a mere "solicitation to litigate," and, at most, affords an "opportunity to become a party," which, although known to him, "has no effect upon his rights," is obviously untenable. The only case cited in support of this suggestion is

> *Denny* vs. *Bennett*, 128 U. S., 489;

in which a party was given *leave* to intervene, but did not do so, and was held not bound by the judgment. By the statute under discussion all persons interested in the land involved in the action are made parties, and are *summoned* to appear and defend *or be foreclosed* of their rights.

In this connection, we may briefly refer to an instance

in which counsel have used a phrase in the act as the basis for a contention to which every provision of the act is an answer. On page 10 of their brief it is argued that unknown claimants, who do not appear, *are not parties* to the proceeding because of the words of Section 8 fixing the time for appearance and allowing such a person three months from the first publication within which to "appear and make himself a party to the action by pleading to the complaint."

Every section and phrase of the act show its intention that all persons claiming any interest in the property are to be deemed parties to the action and bound by the decree. Counsel themselves do not seriously dispute this, and the suggestion is no more than a play on words.

The phrase used in the act is one frequently employed. Thus, in *Van der Poel* vs. *Van Valkenburgh*, 6 N. Y., 190, 199, speaking of a proceeding for the probate of a will, Gardner, J., says:

> "It is in the nature of a proceeding *in rem* to which all persons having an interest in the subject of litigation *may make themselves parties and are consequently bound by the decree.*"

So, in *Bonnemort* vs. *Gill*, 167 Mass., 340,

> "The decree of the Court admitting the will to probate is in the nature of a judgment *in rem*, which establishes the will against all the world. Any person interested may *make himself a party to the proceedings* by applying to the proper tribunal, and he is forever bound by the decree whether he is in fact a party or not."

The consideration of what might be called the "solicitation to litigate" theory may properly be concluded by a

reference to two opinions of the United States Supreme Court.

In *Botiller* vs. *Dominguez,* 130 U. S., 238, discussing the statute requiring that all claimants to lands in California under Mexican grants should submit the same to a board of private land claims commissioners for confirmation, Mr. Justice Miller, after holding the proceedings to be "judicial" and to afford "due process of law," says:

> "Every person owning land or other property is at all times liable to be called into a court of justice to contest his title to it. This may be done by another individual or by the government under which he lives. It is a necessary part of a free government in which all are equally subject to the laws, that whoever asserts rights or exercises powers over property may be called before the proper tribunals to sustain them. No doubt could exist, and none whatever would have been suggested, if this statute, instead of requiring the individual claimants to take notice that they were called upon to establish their title and to come forward and do so, had provided that the United States should sue everybody who was found in possession of any land in California at the time the treaty was made, and thus compel him to produce his title if he had any. Such suits would have been sustained, without hesitation, as being legal, constitutional and according to right. What difference can it make, then, that the party who is supposed to possess all the evidences which exist to support his claim is called upon to come before a similar tribunal and establish it by a judicial proceeding? It is beyond question that the latter mode is the more appropriate one to carry out the object intended."

Speaking of the same statute in *More* vs. *Steinbach,*

127 U. S., 70, 81; 8 Sup. Ct. Rep., 1067, Mr. Justice Field says:

> "Assuming that the title under the grant was perfect, the obligation of the grantee was none the less to present his claim to the board of land commissioners for examination. The ascertainment of existing claims was a matter of vital importance to the government in the execution of its policy respecting the public lands, and congress might well declare that a failure to present a claim should be deemed an abandonment of it, and that the lands covered by it should be considered a part of the public domain."

The suggestion of counsel that "no one can be summoned into court to defend that which is not alleged against him," and that until "cause" is shown "he is free to go about his affairs and to ignore invitations to litigate," would, we submit, be an unsafe rule for a litigant to follow. One who makes a claim to real property is not entirely "free to go about his own affairs and to ignore invitations to litigate" when they take the form of a summons in a suit to quiet the title to such property. The law might, on the contrary, even compel such a person to establish his claim before a proper tribunal and treat his failure to do so as an "abandonment of it."

Throughout the brief for appellant are cited cases, which hold that persons who are not parties to a proceeding are not bound by the decrees rendered in it. The principle is, of course, undisputed, and, it is equally obvious, has no application to any point in the case at bar. Every "person claiming any interest in or lien upon the property" is served with process, is entitled to appear, plead, raise issues, introduce evidence, participate

in the trial of them, appeal from a decree against him, and, if not personally served, move within a year for a vacation of that decree. If such persons are not "parties" to an action or proceeding, it is only because unknown claimants cannot be made parties—a proposition which, we believe, has already been sufficiently answered.

Who is a "party" to an action or proceeding?

> "Parties in that connection" (*i. e.*, with respect to the conclusiveness of judgments) "include all who are directly interested in the subject-matter, and who had a right to make defense, control the proceedings, examine and cross-examine witness, and appeal from the judgment. Persons not having those rights substantially are regarded as strangers to the cause, but all who are directly interested in the suit and have knowledge of its pendency and who refuse or neglect to appear and avail themselves of those rights are equally concluded by the proceedings."
>
> *Robbins* vs. *City of Chicago*, 4 Wall., 672.

For a long list of cases to the same effect see 24 Am. & Eng. Ency. Law (2nd Ed.) 735.

9. In a Proceeding Under the Act All Unknown Claimants Are Adverse Parties From the Beginning. The Mere Possibility of Adverse Parties Would, However, Be Sufficient to Render a Proceeding "Judicial."

Authorities in number, dealing wth suits against unknown owners, have already been considered.

Many authorize a plaintiff in particular actions respecting the title of real property to join as defendants with those who are named "all persons known or unknown claiming an interest in the property." Other statutes provide for suits, naming as defendants *only* persons des-

ignated by general description, or for notice "to all concerned." But, whether parties sued by general designation are under such statutes joined with named parties or not, the same considerations control.

As observed by Chief Justice Holmes in the Tyler case, where parties are sued by general designation, the fact that *other* defendants are *named* cannot distinguish the case, so far as the former are concerned, from a case where *all* are sued by general designation. The joinder of named defendants does others "no good as they are not named." (175 Mass., 71, 75.)

A proceeding is judicial whenever, upon a party "making a demand in a court of justice for such remedy as the law affords," process is provided for ascertaining the existence of persons claiming adverse interests, for notice to such persons, and for the hearing and adjudication of such rights as they may urge in opposition to the relief demanded by the plaintiff. The *most* that can be held essential to such a proceeding is, that there *may be* adverse parties. This is all that is certain in nearly every special proceeding instituted by petition and prosecuted by citation.

In re Pac. Ry. Commission, 32 Fed., 241, Mr. Justice Field says:

> "Whenever the claim of a party under the constitution, laws or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present *or possible* adverse parties, whose contentions are submitted to the court for adjudication."

So, in *Ormsby* vs. *Webb,* 134 U. S., 47; 10 Sup. Ct. Rep., 478, speaking of a petition for probate and pointing out the features in which it differed from an ordinary suit in equity, the Court says that such a proceeding for probate is,

> "although of a peculiar character, * * * nevertheless a case in which *there may be* adversary parties and in which there may be a final judgment affecting rights of property."

10. **Even "Ex Parte" Proceedings May Be Judicial.**

Counsel for appellant, in the argument that adverse parties are essential to a judicial proceeding, quote with frequent repetition the language of Blackstone, in which he speaks of a *actor judex* and *reus* as being essential to a court of justice. The validity of this definition is not here involved, since there was a *reus* in *Zeiss* vs. *All Persons, etc.* There were existing adverse claimants, who were defendants, but suffered a default to be taken against them for failure to appear within the time allowed.

The definition of Blackstone has, however, often been criticized. Its literal meaning must either be construed away, or most of the special proceedings permissible under Code procedure, which are instituted by petition and prosecuted by citation to the world, must be held to be the exercise of "non-judicial" power. It will suffice in reference to this definition to quote from the opinion of Mr. Chief Justice Robertson in *Bruce* vs. *Fox,* 1 Dana (Ky.) 447:

> "In defining suit in court it is generally said that there is '*actor reus* and *judex,*' and generally this is

> true. But it is not universally true that there can be no judgment or judicial order without both *actor* and *reus*. 'An action is a lawful demand of one's right.—Co. Lt., 285a, 2 Institutes 40, and such a demand may be made judicially in an *ex parte* proceeding or application, or without any action; a legal right may be violated or withheld erroneously by a court acting merely *ex officio*.
>
> "* * * *Ex parte* writs of error are known to every revising court, and when this Court spoke of *actor reus* and *judex* in the cases of Allaway, in Bibb's Reports (2 Bibb, 554) and of Taylor in J. J. Marshall's (3, 401) it should be understood as only repeating the common definition of a suit and as using it to fortify other circumstances tending to show that the cases it was then deciding on were not such as should be deemed judicial. If a judicial case can be *ex parte* in the circuit court it must be *ex parte* here."

This case is cited, not because the proceeding prescribed by the statute is "*ex parte*," for it is not, but to show the obvious error of a definition which assumes the presence of a "*reus*" to be indispensable to a court of justice. Of the cases cited by counsel in their brief, which, following that definition, describe the three parties as essential in a court, it is sufficient to say, as was said by Mr. Chief Justice Robertson, in reference to early cases of this kind in Kentucky, that those courts must

> "be understood as only repeating the common definition of a suit and as using it to fortify other considerations tending to show that the cases it was then deciding on were not such as should be deemed judicial."

11. Various Classes of Proceedings Analogous to Those Authorized by the Act Here Attacked.

Passing now to a consideration of the various classes of proceedings which dispose of the suggestion that the action prescribed by the act of June, 1906, is outside the realm of judicial cognizance, the two premises of that contention may be briefly re-stated as follows:

First. That there can be no judicial proceeding to quiet title against unknown claimants, since the very fact that the claims are unknown makes it impossible to allege that their holders have injured the plaintiff.

Second. That no court can be empowered to make a *declaratory* decree establishing a plaintiff's right until it has been violated by a defendant.

In some of the classes of cases to be considered, the proceedings involved were to obtain "declaratory" decrees (if a decree establishing and quieting title against adverse claims is "declaratory" in any sense). In others the proceedings were against unknown owners. In still others, both of these factors were present. The cases showing that unknown owners *can* be sued for the purpose of quieting title to real property of course answer the entire contention, but have already been discussed at length under the preceding main heading of this brief.

(a) *The Torrens Acts of the various states and the Burnt Records Act of Illinois.*

The numerous cases upholding the validity of proceedings under the Torrens system of land registration are cases in which not only declaratory decrees were involved, but in which they were binding upon all persons,

known and unknown. The same is true of those sustaining the Burnt Records Act of Illinois. These have already been reviewed, and need not be again considered at this point.

(b) *Proceedings for the confirmation of tax titles, etc.*

In a number of states there exist statutes authorizing proceedings for the confirmation of tax titles, in most which provision is made for the joinder of the original owner of the land *and all other persons, known or unknown.* Numerous cases involving statutes of this class have already been cited. It is obvious that, like the Torrens Acts, such statutes provide proceedings not only for "declaratory" decrees (in the sense used by counsel), but for declaratory decrees binding upon the world.

The statute of Arkansas is of this class. It has been upheld without suggestion of its invalidity in numerous cases (See cases cited, 21 Enc. of P. and P., 492), is treated as an action *in rem*, which concludes absent claimants as well as participating parties (*Worthen* vs. *Ratcliffe*, 42 Ark., 330), and has received the approval of the Supreme Court of the United States in at least two cases.

Parker vs. *Owen*, 18 Howard, 137;
Thomas vs. *Lawson*, 21 Howard, 331.

(c) *Suits under general equity jurisdiction to establish title.*

Suits to *establish* title are not dependent for their existence upon statutory authorization. They constitute an accepted and undoubted branch of equity jurisprudence. Chancery will take jurisdiction where for any

reason the record title of a party is imperfect, *for the very purpose of establishing that title as matter of record.* In exercising such jurisdiction equity, of course, proceeds against particular defendants except where statutes providing for general service upon unknown owners exist; but the basis for the exercise of the jurisdiction is the *absence of a record title.* For the purpose of establishing such title, equity treats the case as analogous to a bill for the re-execution of a lost or destroyed instrument, and, *without reference to adverse claims, will give to the party who holds a legal but not a record title the means of establishing it of record by a decree of Court.*

> *Sharon* vs. *Tucker*, 144 U. S., 533; 10 Sup. Ct. Rep., 720,

is the leading case upon this point. In it there were named parties but in no true sense a "controversy," and the real "cause of action" was *the absence of record title to real property* of which the plaintiff was the legal owner.

That case involved, to use the language of Mr. Justice Field, who delivered the opinion, a

> "suit in equity *to establish as matter of record* the title of the complainants to certain real property in the City of Washington * * * and to enjoin the defendants from asserting title to the same premises as heirs of the former owner."

The complainant was not, at the time of commencing the suit, in actual possession of the property, but had acquired title by adverse possession for the period required by law.

> "There was no substantial disagreement between the parties as to the facts, but the defendants insisted and relied solely upon the ground that a court of equity could afford no relief to the complainants because they were not at the commencement of the suit in actual possession of the premises."

Answering the objection that a court of equity had not jurisdiction of a suit to establish title in favor of one not in possession, Mr. Justice Field says:

> "The objection of the defendant to the jurisdiction of a court of equity in this case arises from confounding it with a bill of peace and an ordinary bill *quia timet*, to neither of which class does it belong or does it cover the same principle."

A bill of peace, the learned justice points out, is intended to prevent a multiplicity of suits by an injunction quieting the title of the plaintiff against repeated litigation in actions of ejectment.

> "It is only where bills of peace of this kind—more commonly designated as bills to remove a cloud on title and quiet the possession of real property—are brought that proof of the complainants' actual possession is necessary to maintain the suit. *Frost vs. Spitley*, 121 U. S., 552, 556; 7 Supt. Ct. Rep., 1129."

> *There is no controversy such as here stated in the present case. The title of the complainants is not controverted by the defendants nor is it assailed by any actions for the possession of the property, and this is not a suit to put an end to any litigation of the kind. It is a suit to establish the title of the complainants as matter of record—that is, by a judicial determination of its validity*—and to enjoin the assertion by the defendants of a title to the same property from the former owners which has been

lost by the adverse possession of the parties through whom the complainants claim. *The title by adverse possession, of course, rests on the recollection of witnesses, and by a judicial determination of its validity against any claim under the former owners, record evidence will be substituted in its place.* Embarrassments in the use of the property by the present owners will be thus removed.

"Actual possession of the property by the complainants is not essential to maintain a suit *to obtain in this way record evidence of their title* to which they can refer in their efforts to dispose of the property.

"The difference between this case and an ordinary bill *quia timet* is equally marked. A bill *quia timet* is generally brought to prevent future litigation as to property by removing existing causes of controversy as to its title. *There is no controversy here as to the title of the complainants.* The adverse possession of the parties though they claim was complete within the most exacting judicial definition of the term.

"* * * As the complainants have the legal title to the premises in controversy and as no parties deriving title from the former owners can contest that title with them, there does not seem to be any just reason why the relief prayed should not be granted. Such relief is among the remedies often administered by a court of equity. It is a part of its ordinary jurisdiction to perfect and complete the means by which the right, estate or interest of parties—that is, their title—may be proved or secured, or to remove obstacles which hinder its enjoyment."

After a quotation from Pomeroy's Equity Jurisprudence showing the elasticity of equitable remedies, Justice Field reviews the decided cases in which equity has been called upon *to establish record title.*

The first case considered is *Blight's Heirs* vs. *Banks*, 6 T. B. Mon. (Ky.), 192, where

> "a bill was filed by the complainant to supply the want of certain records or conveyances under which he claimed title, said to have been executed and lost. * * * These conveyances had not been recorded; on that ground the complainant alleged that his title was in jeopardy from creditors and innocent parties; that with great difficulty any title could be established at law because the conveyances could not be given in evidence without parol proof; and that some of the witnesses were dead; and some of the original conveyances were lost and could not be found. His prayer was that his title might be rendered complete as a record title by the decree of the Chancellor. The first question made in the case by the defendant was as to the jurisdiction of the Court. It was contended that such omissions in competing a defective title were generally the fault of the grantees and that equity would not sustain a bill for that purpose, but the Court of Appeals of Kentucky replied that it could not doubt the interference of the Chancellor in such case. '*Equity,*' said the Court, '*will frequently interfere to relieve defects in land titles where a party cannot proceed without difficulty at law; where the conveyances are lost* or in the possession of the opposite party, or where the parties are numerous and the proof hard of access; and in many such cases it will lighten the burden and settle many controversies and bring them into a small scope.
>
> "And where the title is purely legal for such and similar causes to those we have enumerated, equity has carved out a branch of jurisdiction and a class of bills termed in the books 'ejectment bills,' in which not only the title is made clear but the possession decreed also. No reason is perceived by us why the present case is not within the spirit of these cases. The difficulties in an unrecorded title, espec-

> ially if it is derived through a long chain of conveyances, are familiar to our courts in this country. The danger to which the title is exposed from two classes of persons, creditors and subsequent purchasers, is often great, and the facilities afforded from a title which can be read in evidence without other proof than the authentication annexed are felt by every one who has to bring his title into court for attack or defense; and the present case will furnish a good comment on the propriety of the interference of the Chancellor.' "

A petition for rehearing having been filed, on reviewing its former opinion the Supreme Court of Kentucky said (the language being quoted by Justice Field in *Sharon* vs. *Tucker, supra):*

> "It is true that bills to make legal titles which are valid as against all the world, except two descriptions of persons, recorded titles, and thus to protect them from creditors and innocent purchasers have not been frequent. But if such bills cannot be allowed under one state of conveyances, it must certainly be said that there is a defect of justice in our country. A court of common law can give no relief in such a case, and if equity cannot do it, then is the case a hopeless one. If, however, the principles which govern courts of equity are examined, it will be found that there are many circumstances in this case, independent of defective conveyances, which sustain the jurisdiction."

To the language of the Kentucky case which is quoted by Mr. Justice Field should be added this continuation of it:

> "Courts of equity will aid titles defective in the formalities of law, supply deficiences, and even enforce legal titles where the evidence cannot be got at in a court of law and even where it can, if many

> suits can be prevented, or where the title is much entangled, equity will entertain jurisdiction of the matter. If these and other principles of the jurisdiction of courts of equity are scrutinized and this record is examined, the mind must be skeptical which still contests the jurisdiction."

Mr. Justice Field, continuing the opinion in *Sharon* vs. *Tucker*, cites for additional illustration of the rule that equity will establish a title of record where the legal owner has not this means of vindicating its validity, the cases of

> *Hord* vs. *Baugh*, 7 Humph., 576;
> *Montgomery* vs. *Kerr*, 6 Cold., 199;
> *Bohart* vs. *Chamberlain*, 92 Mo., 622; 13 S. W., 85.

and concludes;

> "Many other authorities to the same purport might be cited. They are only illustrative of the remedies afforded by courts of equity to remove defects in the way of owners of property using and enjoying it fully when, from cause beyond their control, such use and enjoyment are obstructed. The form of relief will always be adapted to the obstacles to be removed. The flexibility of decrees of a court of equity will enable it to meet every emergency. Here the embarrassment to the complainants to the use and enjoyment of their property are obvious and insuperable except by relief through that court. No existing rights of the defendants will be impaired by granting what is prayed, and the rights of the complainants will be placed in a condition to be available. *The same principle which leads a court of equity upon proper proof to establish by its decree the existence of a lost deed and thus make it a matter of record, must justify it upon like proof in declaring by its decree the validity of a title resting in*

> *the recollection of witnesses, and thus make the evidence of title a matter of record.* It is therefore ordered that the decree of the court below be reversed and the case remanded to that court with directions to enter a decree declaring the title of the complainants to the premises described in their complaint by adverse possession of the parties through whom they claim, to be complete, and that the defendants be enjoined from asserting title to the said premises through their former owner."

This case alone does away at once with the theory urged by counsel throughout their brief that courts do not exist to "merely declare existing rights," and that to allow a court by a decree to merely make a record title where a title already exists, although unrecorded, or where the records have been destroyed, is to turn them into "registration offices." It shows not only that the legislature can provide by statute, but, indeed, that *a court of equity by virtue of its inherent power could declare and make a matter of record* a title which, though unattacked and unimpeached, is not thus susceptible of record proof. The only remaining question is the right of a State to quiet title to land within its borders as against unknown claimants. This has, we believe, been already established beyond question.

Indeed, Congress has made provision whereby the equity jurisdiction declared in *Sharon* vs. *Tucker, supra,* is made effective to establish a title of record *against the world.* Section 111 of the Code of the District of Columbia authorizes the holder of any title acquired by adverse possession (and therefore resting in parol) to file a bill "to have such title perfected." In such action

it is necessary only to join those appearing *of record* as possible claimants to the property, even if (unknown to plaintiff) such claimants are dead, or (if any are known to be dead) against their unknown heirs and devisees sued by general designation.

In *Gwinn* vs. *Brown*, 21 App., D. C., 295, 312, it is said:

> "The object of the act of Congress of March 3, 1899, now constituting Section 111 of the Code, is not to change the law of adverse possession but to invest a court of equity with power and jurisdiction to make declaratory decrees, as to the rights of parties who may show that they have acquired a title by adverse possession, such as may be sufficient in point of law to bar all other claimants of the property, and to direct a copy of such decree to be entered of record in the office of the Recorder of Deeds for said district. By this means the title is made perfect of record instead of resting *in pais* merely, dependent upon the uncertainties of parol testimony."

In *Johnson* vs. *Thomas*, 23 App. D. C., 141, 148, the same section was under consideration.

> "The proceeding authorized by this section of the Code is not merely a proceeding to quiet title as against a particular claimant, *but it is practically an equitable action of ejectment to establish the right and title of the complainant as against all the world. The purpose of it is to procure and place among the land records of the District of Columbia a decree declaring a perfect title to have become vested in the complainant by adverse possession as though the complainant had been the first grantee from the state.*"

The section is described in *Harvey* vs. *Miller*, 24 App., D. C., 51, 53, as one

"which reduces to the form of a statute the rule of equity stated by the Supreme Court of the United States in the case of *Sharon* vs. *Tucker*, 144 U. S., 533, for the conversion of a title by adverse possession into a record title."

The rule of *Sharon* vs. *Tucker, supra,* is expressed and numerous cases which support it are cited in I Cyc., page 1138, where, referring to parties who have title only by adverse possession and do not therefore possess the record means of vindicating their validity, it is said:

"It is likewise an incident of the completion of the statutory bar, that the title thus acquired will be quieted in the adverse holder on a bill in equity for that purpose even against the holder of the legal title barred, and the defendants will be enjoined from asserting title to the premises from former ownership that has been lost. *This is true, although the adverse title has not been used to disturb him and though the title be equitable and not at law.* When adverse possession is relied on by a complainant as a ground for the removal of a cloud on his title, the right must of necessity be effectuated by extraneous evidence, and *equity may always be invoked in the absence of legal remedies to quiet a title thus resting in parol.*"

Before leaving this point, one more case may be cited. It is interesting for two reasons: First, because it shows that the holder of a legal title may sue to establish that title of record, even though there has been no disturbance or danger or threat of disturbance of the complainant in his possession or title by the holders of the outstanding claim; second, because the argument of counsel in that case closely resembled the contention in the case at bar. The granting of the relief prayed by the bill was resisted because "the petition is totally defective, *for it presents*

*no fact which shows any injury done, or damage to be done by defendants to him. * * * The Court will only apply its remedial justice to prevent an injustice done or about to be done by defendants.*" The Court said in answer:

> "It is said that the defendants have not disturbed the plaintiff in his possession or title, and that he has therefore no cause of action against them, but our courts have always held that the owner of land may invoke the aid of the court to remove a cloud created by an adversary title, although the adversary title had not been used to disturb him."

After observing that actions of trespass to try title were "every-day practices," whether there had been any disturbance or threat of disturbance of possession, the Court concludes:

> "*The legal effect and object of such suits are solely to establish the plaintiff's and conclude the defendants' title by the judgment.*"
>
> *Moody* vs. *Holcomb*, 26 Tex., 714.

(d) *Generally, proceedings instituted by petition, prosecuted by citation, and involving the same considerations as to "controversy," "cause of action" and "parties" as are here suggested.*

In an earlier portion of the brief it has been pointed out that the argument made to show that the proceedings under the act of June, 1906, was "non-judicial," would prove that almost every special proceeding under Code practice was equally "non-judicial." These are begun by petition rather than *complaint*, are prosecuted by citation, and, so far as parties are concerned, call upon

all persons to appear and litigate such claims as they may have. They involve the same considerations as those here presented so far as "controversy" and "cause of action" are concerned.

Most prominent, of course, of this class of proceedings are those in probate, guardianship, etc. The number of such proceedings authorized by the Code of California, in the various steps of the administration of decedents' estates, of trust accounts, and in guardianship matters, make impracticable an enumeration of them. Other illustrations of this class of proceedings found in the Code of California are:

(1) Proceedings "in the nature of actions to declare heirship" (C. C. P. 1664);

(2) Proceedings to declare married women sole traders (C. C. P. 1811, *et seq.*);

(3) Proceedings for the perpetuation of testimony where "the proof of some fact is necessary to protect the title to property in which he is interested, or to establish marriage descent, heirship, or any other matter which may hereafter become material to establish, *though no suit may at the time be anticipated*, or if anticipated, he may not know the parties to such suit" (C. C. P. 2084, *et seq.*);

(4) Proceedings relative to escheated estates (C. C. P. 1269);

(5) Proceedings for the dissolution of corporations (C. C. P. 1227);

(6) Proceedings for change of name by persons or corporations begun by petition, prosecuted by citation,

addressed to all persons, ordering them to show cause, and concluded by a decree (C. C. P. 1275, *et seq.*);

(7) Proceedings relative to estates of missing persons (Stats. 1893, p. 218);

(8) Proceedings for the adjustment, settlement and payment of indebtedness existing against municipalities at the time of exclusion of territory therefrom (Stats. 1893, p. 536);

(9) Proceedings to procure decrees determining life estates and homesteads (C. C. P. 1723);

This list, of course, is not exhaustive of the proceedings which in California alone are instituted by petition, which allege only the right of plaintiff and no violation of that right by any defendant, in which process is served by citation to all persons interested and in nearly all of which a decree when rendered is conclusive on the world.

We have included probate proceedings in the list, although counsel claim such proceedings to be purely administrative and exercisable by the Superior Court only, because the Constitution confers jurisdiction over them upon it. We shall hereafter show that probate proceedings are strictly judicial. That some of the proceedings above enumerated involve property rights need not, we think, be argued. That all of them are within the domain of "judicial power" has never, so far as we know, been questioned.

Yet in none are there parties defendant, except as all interested are made parties defendant by a general citation addressed to them. In none does the petition allege a wrong by any defendant. In none is there a "controversy" set out in a "complaint."

further elaboration of the point seems unnecessary. The proceeding prescribed by the act under discussion is so essentially "judicial" in character, and has so many analogies in the law, that an argument that jurisdiction over it cannot be conferred on a court of justice seems vain and idle.

12. **The Proceeding Prescribed by the Statute is Not "Ex Parte."**

The proceeding prescribed by the Act is referred to in the brief of counsel (not once but a hundred times) as "*ex parte.*" On the theory that it is "*ex parte,*" case after case and quotation after quotation are used to show that "*ex parte*" proceedings are not judicial and bind none but the applicant. If it were necessary it could easily be shown that any number of *ex parte* proceedings are "judicial."

See *Bruce* vs. *Fox*, 1 Dana (Ky.), 450.

But *the proceeding provided by this statute is not "ex parte."* To say that it is, in the expressive diction of counsel, is "to deny the authority of language as the "crystallization of thought; is to invent a new and arbitrary phraseology in its stead."

What is an "*ex parte*" proceeding?

> "A judicial proceeding, order, injunction, etc., is said to be *ex parte* when it is taken or granted at the instance or benefit of one party only *and without notice to or contestation by any person adversely interested.* * * *
>
> "In its more usual sense, *ex parte* means that an application is made by one party to a proceeding in the absence of the other. Thus, an *ex parte* injunction is one granted without the opposite party

having had notice of the application. *It would not be called ex parte if he had notice of it and chose not to appear to oppose it.*—(SWEET.)"

Black's Law Dictionary.

To the same effect see 18 Cyc., 1500.

A large proportion of counsel's argument and an equally large proportion of the cases cited by them relate to *ex parte* proceedings and their binding effect. So far as this is true, the argument may be dismissed with the observation that no *ex parte* proceeding is contemplated by the statute. There is notice to every possible adverse party in every mode which our law recognizes as a medium of imparting notice. There is personal service of process upon all who can be personally served; there is constructive service of process, not in one but in three modes—on all who cannot be personally served.

13. The Proceeding Prescribed by the Statute Involves No Declaration of "Future Rights."

Quite as irrelevant as the discussion of "*ex parte*" proceedings is the discussion of the practice of equity in making declarations as to "future rights." The brief of counsel for appellant contains quite a full treatment of the latter question. What conceivable connection the indisposition of a court to declare "future rights" can have with a proceeding by a *present* plaintiff in *present* possession, to establish his *present* title, to remove *present* clouds upon that title, or to determine *present* adverse claims, is not made plain. The cases cited by counsel under this heading relate to attempts made by remaindermen, reversioners, or per-

sons holding future contingent interests to procure declarations as to what their rights will be after the determination of the present estates. What analogy has such a proceeding to a suit to establish title and quiet adverse claims to property by one in possession of it? We are entirely safe in saying that no case can exist which holds that a suit to remove a cloud from title or to establish a title as a matter of record is an attempt to procure a declaration of "future rights" and therefore outside the pale of judicial cognizance. At most, the question is one of practice not of judicial *power*.

If it were material it would not be difficult to show that courts of equity *do* frequently declare as to "future rights." A court of equity will, for instance, "where a man covenants to save another harmless in respect to certain payments which are to be made from time to time," take jurisdiction of a bill filed

> "*before any breach* for the purpose of obtaining a decree that the defendant shall specifically perform his covenant, and a reference to a master will be directed to report from time to time any breach that may happen, so that the action of the Court may at once be taken thereon."
>
> Bispham's Principles of Equity, p. 51.

Indeed, the basis of bills *quia timet* (analogous to the *brevia anticipantia* at common law) is

> "to guard against possible or prospective injuries and to preserve the means by which existing rights *may be protected from future or contingent violations.*"
>
> Bispham's Principles of Equity, 607.

So, while it is true, we think that equity will not ordinarily entertain a bill merely to declare the rights of a remainderman, even this rule has its exceptions, and there is

> "a class of cases in which recommendations or requests in a will to a devisee or legatee have been construed as cutting down an absolute fee into an estate for life with an equitable remainder to the person indicated by the testator in his request. *In such cases the Court will entertain a bill during the life of the first taker to have the right of the claimant in the remainder established.*"
>
> *Cross* vs. *De Valle*, 1 Wall., 15.

But the entire subject is of no materiality to this discussion. The proceeding under the statute here involved asks no declaration of "future rights," but the protection and establishment of present rights. The jurisdiction of a Court, even in the absence of a statute to establish by decree as matter of record a title which is not matter of record, is so conclusively established by cases of which *Sharon* vs. *Tucker*, 144 U. S., 533, is a type, that further argument upon the question is, we think, uncalled for.

Decrees which are

> "*simply declarative, that is, their main and direct object is to declare, affirm and establish the right, title, interest or estate of the plaintiff, whether legal or equitable,*"

form one of the large divisions of equitable remedies.

Pomeroy's Eq. Jurisprudence, Sec. 171.

F. Review of the Propositions Discussed and Authorities Cited in the Brief for Appellant.

In the preceding portions of this brief we have attempted not only to establish as an affirmative proposition the validity of the act here attacked, but (so far as was possible in so doing) to answer the pertinent suggestions in appellant's brief. There are, however, a number of matters which can best be covered by a short review of the brief itself.

1. The Propositions Discussed and Authorities Cited in Appellant's Brief Upon the Judicial Nature of "Ex Parte" Application for a Declaration of Undisputed Rights Are in No Way Relevant to the Case at Bar.

The first part of the brief is devoted to an attempt to establish the proposition that the "declaration of rights" upon "*ex parte* application" is not a "judicial" function. To this there are several answers. First, that there is no "*ex parte*" proceeding here under review. Second, that the decree is not declaratory, except in the sense that every decree establishing a title as matter of record, removing clouds or determining and settling adverse claims is declaratory. Third, that the State has the undoubted power, so far at least as any provisions of the Federal Constitution are concerned, to authorize its courts to entertain suits for declaratory decrees, provided reasonable notice and the opportunity to defend are afforded to who may be affected by such decrees.

The principles and authorities relied upon by appellant in this connection may be briefly reviewed.

Denny vs. *Bennett*, 128 U. S., 489 (cited on page 10 of the brief and at numerous other places in it), was

a case in which a party who was given leave to intervene in a suit did not do so and was held not bound by the judgment. The case is undoubtedly correct, but has no application to any point involved in the case at bar.

Cushing vs. *Laird*, 170 U. S., 69 (cited on page 11 of the brief and repeatedly referred to throughout the latter), is a case in which a proceeding *in rem* for the condemnation of a vessel as a prize resulted in a decree of acquittal. It was held that the only question involved was "prize or no prize," and that one who, with the consent of the only claimant appearing, had conducted the defense on his own behalf, but without disclosing his own title under a previous bill of sale from the claimant, was not estopped to contest the latter's title in a subsequent suit. In other words, in a proceeding *in rem* for the condemnation of a vessel as a prize, a decree that the vessel is not subject to condemnation does not settle the title to the vessel, except as between the government and its owners. When the language of the case is read in connection with its facts, it can be seen how utterly irrelevant to any question here involved are the expressions quoted.

Blagge vs. *Moore*, 23 S. W. (Tex.), 470, is another case repeatedly cited and quoted in the brief. While the case is not in point upon any proposition presented in the case at bar, it is well to note that it has been *overruled* in the state of its origin. The case was twice on appeal to the Court of Civil Appeals of Texas (23 S. W., 466 and 26 S. W., 305.) From the second decision of it by that court, an appeal was taken to the Supreme Court of Texas and the case reversed. The Supreme Court

held that the proceeding involved was "judicial" and expressly disapproved the views of the lower court.

Moore vs. *Blagge*, 91 Tex., 151; 38 S. W., 979.

Bradstreet vs. *Neptune Ins. Co.*, 3 Sumner, 600; Fed. Cas., 1793 (cited on page 15 of appellant's brief), is another case which, because of the frequent reference to it in the brief for appellant, deserves notice. In that case it appeared that a vessel had been seized and confiscated in Mexico by proceedings the record of which disclosed no pleading such as a libel and no cause of forfeiture. A judgment roll in a civil action in which there is no complaint or other pleading by the plaintiff would furnish an analogous case.

On pages 25 to 33 of the brief it is urged:

1. That a court will not exercise jurisdiction over a *fictitious action*.

2. That the doctrine of *obiter dictum* rests upon the ground that the question decided was not involved in the controversy.

3. That an appeal will be dimissed where the controversy has been *settled* between the parties or has *ceased to exist*, and,

4. That courts will not render *opinions* on *abstract questions*, unless the Constitution requires it.

This statement of the points to which the authorities cited on these pages were addressed sufficiently shows the lack of connection between them and the case at bar.

On pages 33 to 36 of appellant's brief is a discussion of the practice of a court of equity in dealing with the deter-

mination of "future rights" in the absence of any necessity or claim for present relief.

Since there is no question of this nature in the case at bar, it is quite unnecessary to consider the practice of equity in this regard. It is worthy of note, however, that of the two cases cited, one (*Farrand* vs. *Wilson*, 4 Hare, 385) *suggests the propriety* of legislation authorizing declarations of future rights, and the other (*Lady Langdale* vs. *Briggs*, 8 DeG. M. and G., 391) is distinguished in *Barraclough* vs. *Brown* (1897), App. Cases, 615, upon the very ground that the present chancery procedure act of England *does* authorize chancery to make declarations of right "whether any consequential relief is or could be claimed or not."

On page 39 of the brief the case of *Cashman* vs. *Cashman's Heirs*, 123 Mo., 549; 27 S. W., 549, is quoted. In that case, without any statutory authorization therefor, one whose title of record was plain, brought an action against the unknown heirs of her husband, she claiming to be the sole heir. It was held that the bill disclosed no cloud upon the plaintiff's title and could not, therefore, be entertained under any head of general equity practice.

The long quotation from *Blagge* vs. *Moore*, 23 S. W. (Tex.) 473, which appears on pages 40 and 41 of the brief, is, as we have already noted, taken from a case overruled, reversed, and its language disapproved by the Supreme Court of Texas.

On pages 45 to 48 is discussed the propriety of the cases in the California courts upholding proceed-

ERRATA:

An error occurs in the paragraph beginning at the top of page 250. The case in which is suggested the propriety of legislation authorizing the practice of declaring "future rights" is *Lady Langdale* vs. *Briggs*, 8 De G. M. & G., 391, 427, 428. The case distinguished in *Barraclough* vs. *Brown* (1897), App. Cas., 615, 623, is *Rooke* vs. *Lord Kensington*, 2 K. & J., 753 (quoted in the brief for appelland at pp. 69-71). See post. top of page 255.

ings under the Wright Act for determining the validity of proceedings looking to the issuance of bonds by an irrigation district. This matter and the opinion of Mr. Justice Brewer in *Tregea* vs. *Modesto Irrigation District*, 164 U. S., 179, are so frequently referred to by counsel for appellant that they may be here briefly considered.

2. The Authorities Dealing With the Judicial Character of Proceedings Under the Wright Irrigation Act Do Not Involve the Question Here Presented.

The statute involved in these cases was one which authorized the directors of a district, *before issuing any bonds* to petition for a confirmation of the proceedings anterior to a *contemplated* issue of them. The California courts have upheld the decrees rendered in these proceedings as judgments conclusive of the question determined. Mr. Justice Brewer, in the opinion referred to, took the view that until the bonds had been issued there was only a *moot question which might never arise, since the irrigation district might never issue the bonds, and prior to their issuance no one was interested in either upholding or controverting their validity.* (While it is unimportant here, it was suggested that a determination in such proceedings might operate *as conclusive evidence* of the validity of the formation of the irrigation district, and this intimation has been followed in later Federal cases.

Miller vs. *Perris Irrigation Dist.*, 85 Fed., 701.

(Compare also

Perris Irrigation Dist. vs. *Thompson*, 116 Fed., 836.)

It is obvious, as said by Mr. Justice Sloss in *Title, etc. Restoration Co.* vs. *Kerrigan*, 150 Cal., 289, 320, that

> "even the acceptance of the views of Justice Brewer would not require us to hold that the proceeding here involved is not judicial."

The action prescribed by the statute in the case at bar is one the object of which is the establishment of a record title and the settlement of adverse claims. There is no "moot question" unless every proceeding in equity under its *quia timet* jurisdiction presents a moot question.

It requires no argument to distinguish a suit to establish and quiet the title to real property from one in which a court is asked to determine the validity of proceedings for the issuance of bonds where no bonds have yet been issued, in which it cannot even be said that any bonds will be issued, where no person has any rights or has incurred any liability arising out of the proceedings involved, in which the petitioners themselves hold a position where "it is nothing to them as agents whether they issue the bonds or not," and wherein the only determination asked is "an adjudication of the right to make a contract, and unless the board should see fit to proceed in the exercise of the power thus held to exist, all the time and labor of the court would be spent in determining a mere barren right—a purely moot question."

3. Probate Proceedings Are Neither "Ex Parte" Nor "Non-Judicial."

On pages 49 to 55 of appellant's brief it is urged that probate proceedings are not permissible under a general

grant of judicial power, and that they are "*ex parte*, merely administrative and involve the exercise of pure prerogative power."

Some probate proceedings are *ex parte*. Most of them are not. The old ecclesiastical probate in "common form," wherein a will was registered without any notification to any one, was both "*ex parte*" and "administrative." Probate in "solemn form," wherein notice was issued to the world and in which, upon the appearance of any contestant there was a trial and a judgment, was neither "*ex parte*" nor administrative," but "judicial." Even if probate proceedings did involve the exercise of pure "prerogative power" (which means only that succession rights depend upon statutory enactment) this would not show that they are not *judicial*. As already frequently pointed out, such proceedings upheld

> "not upon the ground that the state has an absolute power to determine the persons to whom a man's property shall go at his death, but upon the characteristics of a proceeding *in rem*."
>
> Holmes, J. in *Tyler* vs. *Judges*, 175 Mass., 71, 75.

It seems hardly necessary to cite authorities to the point that probate proceedings are judicial. See, however

> *Florentine* vs. *Barton*, 2 Wall., 210.
>
> Woerner on American Law of Administration, Chapter 15, dealing with the "Nature of Probate Courts in America."

4. Insolvency Proceedings Are Judicial in Character.

On pages 55 to 56 of appellant's brief the nature of insolvency proceedings is discussed. It is said that they

are not *ex parte* because every petition discloses creditors. As to creditors not disclosed by the petition (whether the proceeding were one of voluntary or involuntary insolvency), it would seem that the proceeding was "*ex parte*" under counsel's view of what "*ex parte*" means. We are, however, entirely willing to accept the definition of an *ex parte* proceeding given in the case which counsel cite (*Lathrop* vs. *Stewart*, Fed. Cases, 8113), where the Court says:

> "It is contended that proceedings in bankruptcy under that law were virtually *ex parte*. * * * The Court can see no reason for holding that bankruptcy proceedings are in any sense of the term *ex parte* in character. By the express requirement of the bankruptcy act the creditors of the petitioner for relief under it were entitled to notice of the pendency of the petition by publication in at least three newspapers in the district."

After adding that all creditors whose residence was known were entitled to personal service, the Court says: "In this view it was not *ex parte*."

On page 56 of the brief, the case of *In re Morris* (Fed. Cases, 9825) is cited to show "that jurisdiction in insolvency proceedings is not conferred by a general grant of judicial power." A careful reading of the case discloses no such holding. What the case does hold is that insolvency proceedings are of statutory origin.

5. **A Court May Be Empowered to Render Declaratory Decrees.**

What has already been said upon the right of a State to authorize its courts to pass declaratory decrees after notice to all who may be affected thereby, disposes of the

discussion on pages 69 *et seq.* of appellant's brief. The case from which the lengthy quotation on pages sixty-nine and seventy is made is one which, as already noted, was decided before the amendment of the English law authorizing a court of chancery to make "declarations of right" "whether any consequential relief is or could be claimed or not."

Barraclough vs. *Brown* (1897), App. Cases, 615, 623.

6. **The Act is Not "Void" as Depriving Federal Courts of Their Jurisdiction.**

On pages 79 to 91 a test, which has the distinction of novelty at least, is proposed for determining whether the statute affords due process of law to unknown claimants. It is urged on the authority of *Callaghan* vs. *O'Brien*, 199 U. S., 89, that a Federal Court cannot take jurisdiction of a case upon the ground of the diversity of citizenship between persons actually appearing, where the decree would operate *in rem*, and therefore affect the rights of other persons, such a proceeding not being an ordinary suit strictly *inter* parties. It is suggested also that a State cannot deprive Federal Courts of their jurisdiction over controversies where the requisite diversity of citizenship does exist. From these two premises the startling conclusion is drawn that the act is void, because its effect would be to "deprive the Federal Court of their constitutional jurisdiction in cases of diverse citizenship."

This point was made on a petition for a re-hearing of the case of *Title, etc. Restoration Co.* vs. *Kerrigan* in

the State Supreme Court. Its fallacy is apparent. There is no occasion to consider whether counsel are correct in assuming that a proceeding under the act is not a case which may be brought in or removed to the Federal Courts. (It may, however, be said that proceedings under the Burnt Records Act of Illinois have been entertained in the Federal Courts:

Tormley v Clark 134 U.S. 338

Smith vs. *Gage*, 12 Fed., 32.)

If it be assumed that the Federal Courts would not take jurisdiction of a proceeding under the act, it is not because the act "deprives" them of any jurisdiction given them by the Constitution of the United States, or deprives any person of the "right" of removal. It is because the act provides for proceedings in which the "diversity of citizenship" is not such that the Federal Courts have jurisdiction.

In other words, the Federal Constitution confers jurisdiction on those courts only when there is a "controversy between citizens of different States"—language uniformly construed to give jurisdiction only when all the persons on one side of an action are citizens of different States from those on the other side. If a proceeding under the act here involved is not removable, it is not because the act "deprives" any one of his "right" to remove—it does not mention the subject—but because the grant of jurisdiction to the Federal Courts does not cover the case.

It might as well be argued that a State statute allowing the joinder of defendants who are residents of the same State as plaintiff, with those who are non-residents

of that State, is void as "ousting" the jurisdiction of the Federal Courts—as depriving the non-resident defendants of their "right" to remove the case to those courts. The obvious answer in that case would be (as it is here) that there was no "ousting" of Federal jurisdiction, or "deprivation" of any "right" to remove, for the simple reason that there was no Federal jurisdiction to be "ousted" and no "right of removal" in any one of which he could be "deprived."

7 **Other Suggestions Contained in the Brief for Appellant.**

Pages 91 to 129 are taken up with a discussion of the proposition that "the action provided for by the act is not an action *in rem.*" This question and the various points urged by counsel for appellant in that connection have already been considered at such length as to make their re-discussion at this point unnecessary.

After thus discussing the nature of proceedings *in rem*, the brief for appellant reverts to the proposition that "the declaration of rights upon *ex parte* application is not the exercise of judicial power." (Pages 129 *et seq.*)

The first class of cases cited, like most of the illustrations in counsels' brief, are so wide of the mark that it seems unnecessary to distinguish them. It is urged that no question can be *res judicata* unless it has been actually litigated. This is, of course, true where a prior judgment is offered as conclusive evidence of a particular fact in a subsequent suit involving a *different subject-matter*. Where the subject-matter of the two suits is the same, the question is one which concerns the conclusiveness of judgments operating decretally, rather than their effect

as evidence rendering particular issues *res judicata*. In such a case the judgment is binding not only as to matters actually litigated, but as to all which might have been litigated.

Cromwell vs. *Sac. County*, 94 U. S., 351.

It is difficult to see what relation this question has to any point in the case at bar, but, since it is so strenuously urged that nothing can be *res judicata* except what has been *actually litigated*, it has seemed proper to point out the limitations of the apparently irrelevant rule invoked by counsel.

The remaining pages of appellant's brief are devoted to matters which have already been considered by us. It is necessary only to note that certain suggestions of the brief have no connection with any point here involved. On page 154, for instance, it is contended that the act under discussion authorizes the settlement of claims which are not adverse to the plaintiff in the proceeding. As already observed, this question is not presented in the case at bar. The interests claimed by the appellant *were* adverse to those claimed by appellee in the proceeding instituted by the latter in the Superior Court of San Francisco and established by the judgment here assailed.

8. **The Possibility of Fraudulent Proceedings Under the Act is Not Only Small, But Entirely Irrelevant to Any Question Here Involved.**

At the conclusion of appellant's brief are various suggestions as to provisions which the legislature might have incorporated (and in counsels' opinion should have incorporated) into the act. The statute is criticized

upon the ground that by various kinds of fraud and by the commission of perjury, parties might obtain decrees under it without actual knowledge by the real owner of property of the proceedings affecting it.

Most of these suggestions, irrelevant as they are to any question before this Court, are without force. It is probably true that, under this statute as under any other that could be devised, perjury and fraud may be employed. If so, the remedy is that afforded to the victim of perjury and fraud under any other statute. If the fraud is extrinsic, the decree may be set aside and vacated, and most of the devices suggested by counsel would amount to palpable extrinsic fraud.

Complaint is made that the act does not require the proprietor of adjoining property to be served with process. It is sufficient answer to say that no proprietor of adjoining property is here complaining of a deprivation of his rights.

It is suggested that the act should have required an inspection of the block books which were saved from the fire, of the records of the Federal Courts, etc., in order to disclose unknown claimants. The act as construed by the Supreme Court of the State requires due diligence in the discovery of unknown claimants. What constitutes due diligence is a matter for the determination of the Court when the question arises.

> "For the purposes of this statute the adverse claimants whom plaintiff 'knows or of whom he has been informed,' include all as to whom he would, by reasonable inquiry, have had knowledge or information."

Title, etc. Restoration Co. vs. *Kerrigan*, 150 Cal., 289, 318.

The precautions taken by the act to insure notice to all interested in property affected by proceedings under it have already been discussed at length, and need not again be reviewed. The notice afforded by the statute is unquestionably "due process of law," and further this Court is not required to go.

X.

CONCLUSION.

This brief has extended itself to a length far beyond that originally anticipated.

In the main, this is due to the fact that extended quotation has been made from the authorities. It is believed that this full presentation of the actual language of the cases referred to by us, although it has greatly lengthened the brief, will materially lessen the labor of the Court in arriving at a decision of the points involved. The principles and authorities discussed establish, we submit, that the act is valid and affords due process of law to all affected by its provisions.

Whatever the force or weakness of the argument against the validity of the statute, weighty considerations—the imperative public necessity of a remedy such as it provides, the number of persons who have availed themselves of its provisions, the extent to which titles established under it have been relied upon, and the manifest danger and evil of allowing the title to all land in San Francisco to remain, not only without public proof

of validity but without means of establishment,—have justified and demanded as full a discussion as could reasonably be had.

We respectfully submit that the judgment of the Superior Court of San Francisco here attacked was valid and conclusive, and that the decree of the Circuit Court so holding should be affirmed.

Respectfully submitted,

GARRET W. McENERNEY,
WALTER ROTHCHILD,

Amici Curiae.

San Francisco, February 8, 1909.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1909

AMERICAN LAND COMPANY
(A Corporation),
Complainant and Appellee,

vs.

LOUIS ZEISS,
Defendant and Appellant.

280

Compilation of Land Title and Deed Records Now
Prepared by the Secretary of State of Colorado.

Filed this ..... day of March, 1910.

JAMES H. McKINNEY, Clerk.

By ..... Deputy Clerk.

LAND TITLES AND BURNT RECORD ACTS.

THE McENERNEY ACT OF 1906, AND ACT OF 1907 SUPPLEMENTAL THERETO.

CALIFORNIA BURNT RECORD ACTS. 1906 AND 1907.

THE ILLINOIS AND FEDERAL BURNT RECORD ACTS.

THE TORRENS LAND ACT.

Compiled and distributed under direction of
C. F. CURRY, Secretary of State.

1907

Printed at State Printing Office, W. W. SHANNON, Superintendent.

CONTENTS.

ESTABLISHING AND QUIETING TITLE TO REAL PROPERTY— PAGE.

Act of 1906, known as the "McEnerney Act" 5

Supreme Court decision 8

Act of 1907, supplementary to the "McEnerney Act" 9

CALIFORNIA BURNT-RECORD ACTS—

Restoration of School records. Pol. C. § 1696*a* 11

Teachers' certificates. Pol. C. § 1892 12

Public records, secondary evidence. Pol. C. § 1855*a* 12

Certificate issued by public officer 13

Maps, books, etc. 13

Court records 14

Recorded instruments. Pol. C. § 4248 16

Register of Board of Medical Examiners 17

Register of Board of Dental Examiners 17

Register of Board of Pharmacy 17

Articles of incorporation 18

Assessment roll 18

Certificates of stock, bonds, etc. C. C. § 365 19

Private documents. Pol. C. § 3415 21

Bonds of corporations. C. C. § 329 21

Wills. C. C. P. § 1339 22

Disposition of actions and proceedings in which bills of exceptions, etc., have been lost of destroyed 23

ILLINOIS BURNT-RECORD ACTS—

Restoration of court records 24

Decisions under Act 25

Restoration of public records 27

Decisions under Act 36

Copying of damaged public records 43

Recording of deeds, etc. 44

FEDERAL BURNT-RECORD ACT 45

TORRENS LAND ACT 47

Supreme Court decision 73

McENERNEY ACT.

CHAPTER 59.

An act to provide for the establishment and quieting of title to real property in case of the loss or destruction of public records.

[Approved June 16, 1906.]

The people of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. Whenever the public records in the office of a county recorder have been, or shall hereafter be, lost or destroyed, in whole or in any material part, by flood, fire or earthquake, any person who claims an estate of inheritance, or for life in, and who is by himself or his tenant, or other person, holding under him, in the actual and peaceable possession of any real property in such county, may bring and maintain an action *in rem* against all the world, in the Superior Court for the county in which such real property is situate, to establish his title to such property and to determine all adverse claims thereto. Any number of separate parcels of land claimed by the plaintiff may be included in the same action.

SEC. 2. The action shall be commenced by the filing of a verified complaint, in which the party so commencing the same shall be named as plaintiff, and the defendants shall be described as "all persons claiming any interest in, or lien upon the real property herein described, or any part thereof," and shall contain a statement of the facts enumerated in section one of this act, a particular description of such real property, and a specification of the estate, title, or interest of the plaintiff therein.

SEC. 3. Upon the filing of the complaint, a summons must be issued under the seal of the court, which shall contain the name of the court and county in which the action is brought, the name of the plaintiff and a particular description of the real property involved, and shall be directed to "all persons claiming any interest in, or lien upon the real property herein described, or any part thereof," as defendants, and shall be substantially in the following form:

"In the Superior Court of the State of California in and for the county (or city and county) of ———

———————————, Plaintiff, vs. All persons claiming any interest in, or lien upon, the real property herein described or any part thereof, Defendants.	Action No. ——

The People of the State of California, to all persons claiming any interest in, or lien upon, the real property herein described or any part thereof, defendants, greeting:

You are hereby required to appear and answer the complaint of ———, plaintiff, filed with the clerk of the above entitled court and county, within three months after the first publication of this summons, and to set forth what interest or lien, if any, you have in or upon that certain real property or any part thereof, situated in the county (or city and county) of ———, State of California, particularly described as follows: (Here insert description.)

And you are hereby notified that, unless you so appear and answer, the plaintiff will apply to the court for the relief demanded in the complaint, to wit: (Here insert a statement of the relief so demanded.)

Witness my hand and the seal of said court, this ——— (Seal) day of ———, A. D. ———.

———— ————, Clerk."

SEC. 4. The summons shall be published in a newspaper of general circulation published in the county in which the action is brought. The newspaper in which such publication is to be made shall be designated by an order of the court or a judge thereof to be signed and filed with the clerk. No other order for the publication of the summons shall be necessary, nor shall any affidavit therefor be required, nor need any copy of the complaint be served, except as hereinafter required. The summons shall be published at least once a week for a period of two months, and to each publication thereof shall be appended a memorandum in substance as follows:

"The first publication of this summons was made in ——— (here insert name) newspaper on the ——— day of ———, A. D. ———," (inserting the date).

And if the affidavit provided for in section five of this act discloses the name of any person claiming an interest in the property, or a lien thereon adverse to the plaintiff, that fact, together with the name and address (if given) of said person shall be stated in a memorandum to be appended to the summons in substance as follows:

"The following persons are said to claim an interest in, or lien upon said property adverse to plaintiff, (giving their names and addresses as above provided). A copy of the summons, together with a copy of the foregoing memoranda, shall be posted in a conspicuous place on each separate parcel of the property described in the complaint within fifteen days after the first publication of the summons.

SEC. 5. At the time of filing the complaint, the plaintiff shall file with the same his affidavit, fully and explicitly setting forth and showing (1) the character of his estate, right, title, interest or claim in, and possession of the property, during what period the same has existed and from whom obtained; (2) whether or not he has ever made any conveyance of the property, or any part thereof, or any interest therein, and if so when and to whom; also a statement of any and all subsisting mortgages, deeds of trust, and other liens thereon; (3) that he does not know and has never been informed of any other person who claims or who may claim, any interest in, or lien upon, the property or any part thereof, adversely to him, or, if he does know or has been informed of any such person, then the name and address of such person. If the plaintiff is unable to state any one or more of the matters herein required, he shall set forth and show, fully and explicitly, the reasons for such inability. Such affidavit shall constitute a part of the judgment roll. If the plaintiff be a corporation, the affidavit shall be made

by an officer thereof. If the plaintiff be a person under guardianship the affidavit shall be made by his guardian.

SEC. 6. If the said affidavit discloses the name of any person claiming any interest in, or lien upon, the property adverse to the plaintiff, the summons shall also be personally served upon such person if he can be found within the State, together with a copy of the complaint and a copy of said affidavit during the period of the publication of the summons; and to the copy of the summons delivered to any such person there shall be appended a copy of the memoranda provided for in section 4 hereof.

If such person resides out of this State a copy of the summons, memoranda, complaint and affidavit shall be within fifteen days after the first publication of the summons deposited in the United States postoffice, enclosed in a sealed envelope, postage prepaid, addressed to such person at the address given in the affidavit or if no address be given therein, then at the county seat at the county in which the action is brought. If such person resides within this State and could not with due diligence be found within the State, within the period of the publication of the summons, then said copies aforesaid shall be mailed to him as above provided forthwith upon the expiration of said period of publication.

SEC. 7. Upon the completion of the publication and posting of the summons and its service upon and mailing to the persons, if any, upon whom it is hereby directed to be so specially served the court shall have full and complete jurisdiction over the plaintiff and the said property and of the person of every one having or claiming any estate, right, title or interest, in or to, or lien upon, said property, or any part thereof, and shall be deemed to have obtained the possession and control of said property for the purposes of the action, and shall have full and complete jurisdiction to render the judgment therein which is provided for in this act.

SEC. 8. At any time within three months from the first publication of the summons, or within such further time, not exceeding thirty days as the court may, for good cause, grant, any person having or claiming any estate, right, title or interest, in or to, or lien upon, said property or any part thereof, may appear and make himself a party to the action by pleading to the complaint. All answers must be verified and must specifically set forth the estate, right, title, interest, or lien so claimed.

SEC. 9. The plaintiff must, at the time of filing the complaint and every defendant claiming any affirmative relief must, at the time of filing his answer, record in the office of the recorder of the county in which the property is situated, a notice of the pendency of the action containing the object of the action or defense, and a particular description of the property affected thereby; and the recorder shall record the same in a book devoted exclusively to the recordation of such notices and shall enter, upon a map or plat of the parcels of land, to be kept by him for that purpose, on that part of the map or plat representing the parcel or parcels so described a reference to the date of the filing of such notice and, when recorded, to the book and page of the record thereof.

SEC. 10. No judgment in any such action shall be given by default; but the court must require proof of the facts alleged in the complaint and other pleadings.

SEC. 11. The judgment shall ascertain and determine all estates, rights, titles, interests and claims in and to said property and every part thereof, whether the same be legal or equitable, present or future, vested or contingent, or whether the same consist of mortgages or liens of any description and shall be binding and conclusive upon every person who, at the time of the commencement of the action, had or claimed any estate, right, title, or interest in or to said property, or any part thereof, and upon every person claiming under him by title subsequent to the commencement of the action. A certified copy of the judgment in such action shall be recorded in the office of the recorder of the county in which said action was commenced, and any party or the successor in interest of any party to said action may, at his option, file for record in the office of the recorder of such county the entire judgment roll in said action.

SEC. 12. Except as herein otherwise provided, all the provisions and rules of law relating to evidence pleading practice new trials and appeals applicable to other civil actions shall apply to the actions hereby authorized.

At any time after the issuance of the summons, any party to the action may take depositions therein in conformity to law upon notice to the adverse party sought to be bound by such depositions and who have appeared in the action (if any) and upon notice filed with the clerk. The depositions may be used by any party against any other party giving or receiving the notice (except the clerk) subject to all just exceptions.

SEC. 13. The clerk shall number consecutively in a distinct series all actions hereby authorized and shall keep an index and register thereof devoted exclusively to such actions.

SEC. 14. Whenever judgment in an action hereby authorized shall have been entered as to any real property, no other action relative to the same property or any part thereof maintained under this act shall be tried until proof shall first have been made to the court that all persons who appeared in the first action or their successors in interest have been personally served with the papers mentioned in section 6 of this act either within or without this State more than one month before the time to plead expired.

SEC. 15. An executor, administrator or guardian or other person holding the possession of property in the right of another, may maintain, as plaintiff, and may appear and defend in the action herein provided for.

SEC. 16. The word "county" whenever used in this act includes and applies to a consolidated city and county.

SEC. 17. The remedies provided for by this act shall be deemed cumulative, and in addition to any other remedy now or hereafter provided by law for quieting or establishing title to real property.

SEC. 18. All actions authorized hereby must be commenced before July 1st, 1909.

SEC. 19. This act shall be in force thirty days after its passage.

Declared constitutional in the case of *Title and Document Restoration Co.* vs. *Kerrigan*, December 7, 1906; S. F. No. 4646. Opinion written by Associate Justice Sloss, and concurred in by Chief Justice Beatty and Associate Justices Angellotti, Henshaw, Shaw, McFarland, and Lorigan.

CHAPTER 517.

An act supplementary to the act approved June 16, 1906, entitled "An act to provide for the establishment and quieting of title to real property in case of the loss or destruction of public records," providing for the making and recordation of notice of ownership or claim to real property.

[Approved March 23, 1907.]

The people of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. In any case where the title to real property might be established or quieted under the provisions of the act to which this act is supplementary, any person or corporation who is or claims to be the owner of such real property or of any interest therein or lien thereon may, by himself or by his agent, duly authorized by letter of attorney theretofore recorded in the office of the county recorder of the county or city and county where such property is situated, sign, verify and file for record in the office of the said county recorder a notice in substantially the following form, to wit:

"Notice of ownership and claim to real property under an act of the legislature of the State of California approved ——— (here insert the date of the passage of this act), ——— 1907.

"Notice is hereby given that ——— (here insert name of claimant) ———, whose residence is at ——— (here insert street and number, city or town, county and state of residence), is the owner of an interest in the real property situated in the ——— (here insert name of city or town if the property be located in a city or town) ———, county of ——— (here insert name of county or city and county in which property is located) ———, State of California, described as follows: to wit: ——— (here insert a particular description of real property) ———.

"The character of the interest in said real property owned by the claimant is ——— (here insert description of the character of interest in or lien upon the real property) ——— and the said interest was obtained from ——— (here insert the name of the party from whom said interest was obtained) ———, and at the time and in the manner following ——— (here insert time at which and manner in which said interest was acquired) ———."

Said notice shall be signed by the claimant or by his agent, as hereinbefore provided, and shall be verified by the oath of the party signing it, to the effect that all of the statements therein contained are true to the knowledge of said party.

SEC. 2. Upon the filing of said notice for recordation the said recorder shall forthwith record said notice in a book devoted exclusively to the recordation of such notices, and shall properly index the same with reference to the name of the claimant, and shall enter upon a map or plat of the parcels of land in the county (which said map or plat shall be kept by him for that purpose and be devoted exclusively thereto), on that part of the map or plat representing the parcel or

parcels described in said notice, a reference to the date of the filing of said notice for recordation, and, when recorded, to the book and page of the record thereof. From and after three days after the filing of said notice for record, all persons who may thereafter begin actions under the provisions of the act to which this act is supplementary, shall be deemed to have notice of the facts stated in said notice, but neither the filing of said notice for record nor its recordation shall be deemed to give constructive notice to any other person or for any other purpose than as herein prescribed. The original of said notice shall remain on file in the office of said county recorder.

SEC. 3. Any person who, from and after three days after the date of the filing of such notice for record, shall begin any action relating to the real property described in such notice, to perfect or establish his title thereto, or to any part thereof, or any interest therein, under the provisions of the act to which this act is supplementary, must name the claimant in such notice, or any person who is a successor in interest of such claimant under a subsequently duly recorded written instrument, judgment or decree, as a party said to claim an interest in or lien upon the property adverse to the plaintiff in such action in the affidavit and in the memorandum appended to the summons provided for in the act to which this act is supplementary, and must cause such claimant, or such successor in interest of such claimant, by virtue of a subsequently duly recorded written instrument, judgment or decree, to be duly served with summons in such action, in the manner provided by the act to which this act is supplementary, otherwise neither the said action nor any judgment or decree which may be given or made therein shall in anywise affect the title or interest in the property described in such notice, owned by the claimant named therein at the time of the filing thereof, or by any successor in interest of such claimant by virtue of a written instrument, judgment or decree duly recorded subsequently to the filing of such notice and prior to the commencement of the action; *provided, however*, that the failure to name said claimant or such successor in interest, as aforesaid, in said affidavit or memorandum, or to serve such claimant or such successor in interest, shall not affect the validity of the judgment or decree rendered in such action as to any other persons, but such judgment or decree shall be valid and binding upon all persons except such claimant or such successor in interest.

SEC. 4. An executor, administrator or guardian, or other person holding the possession of property in the right of another, may make, sign, verify and file for record the notice and affidavit in this act provided for on behalf of the estate or interest which he represents.

SEC. 5. This act shall be supplementary to the act approved June 16, 1906, entitled "An act to provide for the establishment and quieting of title to real property in case of the loss or destruction of public records."

SEC. 6. This act shall take effect immediately.

BURNT-RECORD ACTS.

CALIFORNIA BURNT-RECORD ACTS.

1906 and 1907.

CHAPTER 35.

An act to add a new section to the Political Code of the State of California to be known as section 1696a relating to substitution for school records or contents of school teachers' registers which may have been or shall hereafter be destroyed by conflagration or other public calamity, and providing for the count of average daily attendance in certain high schools and school districts.

[Approved June 14, 1906.]

The people of the State of California, represented in senate and assembly, do enact as follows:

SECTION 1. A new section is hereby added to the Political Code to be knows as section 1696*a* and to read as follows:

1696*a*. Whenever the school register or registers of any teacher or teachers or other records of any public school district in any school year may have been or shall hereafter be destroyed by conflagration or other public calamity, thereby preventing the teacher or teachers and school officers from making their monthly or annual reports in the usual manner and with accuracy the affidavits of the teacher or teachers, the school principals or other officers of such school district certifying as to the contents of such destroyed registers or other records shall be accepted by all authorities for all school matters appertaining to such school district except that of average daily attendance. The average daily school attendance of any public school district or high school whereof the register or registers of the teacher or teachers or any number of them or other records may have been or shall hereafter be destroyed by conflagration or other public calamity, or whereof, by reason of such conflagration or calamity the regular session or attendance of such district or high school has been interrupted and its average attendance materially affected thereby, shall be its average daily attendance of the next preceding school year increased or diminished by the average yearly percentage of increase or decrease calculated for the next preceding ten years; *provided* that the average daily attendance of such school district or high school for the school year ending June 30, 1906, shall be its average daily attendance for the school year ending June 30, 1905, with five per cent (5%) thereof as increase added thereto.

SEC. 2. This act shall take effect immediately.

CHAPTER 47.

An act to add a new section to the Political Code of California, to be known as section eighteen hundred and ninety-two, relating to the issuance of teachers' certificates, lost or destroyed by conflagration or other public calamity.

[Approved June 14, 1906.]

The people of the State of California, represented in senate and assembly, do enact as follows:

SECTION 1. A new section, to be known as section eighteen hundred and ninety-two, is hereby added to the Political Code of California, to read as follows:

1892. Whenever satisfactory proof is presented to a county or city and county board of education by a teacher to whom such board has heretofore granted a certificate, in accordance with law, that such certificate has been destroyed by conflagration or other public calamity, such board shall, without fee, issue to such teacher, in lieu of the certificate lost or destroyed a new certificate of the same kind, grade, character and tenure of the certificate originally granted. Such proof shall consist of an affidavit by said teacher, giving the grade of such certificate, the date of issue if possible, and upon what it was issued; accompanied by a statement from the county or city and county school superintendent to the effect that such teacher had, in pursuance of the requirements of section 1696 of the Political Code filed his certificate for record with such official. Said proof of loss or destruction of a certificate shall be a credential upon which a county or city and county school superintendent may issue a temporary certificate, in accordance with the provisions of subdivision 7th of section 1543 of of the Political Code.

SEC. 2. This act shall take effect immediately.

CHAPTER 52.

An act to add a new section to the Code of Civil Procedure to be known as section eighteen hundred and fifty-five a, relating to secondary evidence of public records or documents lost or destroyed by conflagration or other public calamity.

[Approved June 16, 1906.]

The people of the State of California, represented in senate and assembly, do enact as follows:

SECTION 1. A new section is hereby added to the Code of Civil Procedure to be known as section eighteen hundred and fifty-five *a*, to read as follows:

1855*a*. When it is desired to prove the contents of any public record or document lost or destroyed by conflagration or other public calam-

ity and after proof of such loss or destruction, there is offered in proof of such contents, any abstract of title issued and certified to as correct by any person, firm or corporation engaged in the business of preparing and making abstracts of title issued and certified to as correct by any such person, firm or corporation, the same may be admitted in evidence on proof that the same was prepared and made in the ordinary course of business prior to such loss or destruction, and without further proof by the person who actually made the copies, extracts, notes or memoranda of records, constituting such abstract of title that they were correctly taken from the original record or document; *provided, nevertheless,* that whenever and as soon as said action is set for trial any party so desiring to use said evidence shall notify all other parties to the action who have appeared therein, of his intention to use the same at the trial of said action, and shall give all such other parties a reasonable opportunity to inspect the same and to take copies thereof.

SEC. 2. This act shall take effect immediately.

CHAPTER 53.

An act providing for the issuance of duplicate certificates, where certificates issued under authority of law have been lost or destroyed by conflagration or other public calamity.

[Approved June 16, 1906.]

The people of the State of California, represented in senate and assembly, do enact as follows:

SEC. 1. Whenever any public board or officer is authorized by law to issue any certificate of any kind, and the records in the office of such board or officer show the issuance of such certificate, and it is made to appear by affidavit that such certificate has been lost or destroyed by conflagration or other public calamity, such board or officer may issue a duplicate of such certificate, which shall recite the issuance and loss or destruction of such original certificate, and shall have the same force and effect as such original certificate; *provided,* that this act shall not apply to certificates of acknowledgments.

SEC. 2. This act shall take effect immediately.

CHAPTER 54.

An act to provide for the copying of books, documents, maps or records required by law to be kept or preserved by city, county, or city and county officers, which have been damaged by conflagration or other public calamity.

[Approved June 16, 1906.]

The people of the State of California, represented in senate and assembly, do enact as follows:

SECTION 1. Whenever any book, document, map or record required by law to be kept or preserved by any city, county, or city and county officer has been or may hereafter be damaged by conflagration or

other public calamity, it shall be lawful for the board of supervisors, or board of trustees, of the city, county, or city and county in which the same is required to be kept or preserved, to cause such book, document, map or record to be copied and transcribed into a new and well-bound book.

SEC. 2. Said book, document, map, or record, when so copied or transcribed, shall be carefully compared with the original thereof, and when the same shall have been so copied and compared with the original thereof, the persons who have done such comparing shall each make an affidavit which shall be incorporated into the book, document, map or record as copied, that said book, document, map or record and each and every part thereof is a true copy of the original book, document, map or record, and each and every part thereof; that the matter of record which appears upon every page of the original appears also upon the same page of the copy; and that no matter of record appears upon any page of the copy, which is not to be found upon the same page of the original. Said book, document, map or record shall also be authenticated under the hand of the officer having the custody thereof, to the effect that the same is a true copy of the original book, document, map or record so damaged.

SEC. 3. Any such new book, document, map or record copied and authenticated as above provided, shall be prima facie evidence of the contents of the original book, document, map or record; and it shall bear the same name and designation as the original thereof, and certified copies of any instrument so copied into it shall have the same force and effect as certified copies of the original made from the original book.

SEC. 4. The board of supervisors or board of trustees of such city, county, or city and county, may make such provision for the payment for copying and transcribing the books, documents, maps and records under this act, out of the city, county, or city and county treasury, as to them may seem reasonable, not exceeding the amount now authorized to be received for copying and recording the originals thereof, and the same shall be a charge against the city, county, or city and county.

SEC. 5. This act shall take effect immediately.

CHAPTER 55.

An act relating to the restoration of court records which have been lost, injured or destroyed by conflagration or other public calamity.

[Approved June 16, 1906.]

The people of the State of California, represented in senate and assembly, do enact as follows:

SECTION 1. Whenever in any action or special proceeding, civil or criminal, in any court of this state, any judgment, decree, order, document, record, paper, process, or file, or any part thereof, shall have been or shall hereafter be lost, injured or destroyed by reason of conflagration or other public calamity, any party or person interested therein

may, on application by a duly verified petition in writing to such court, and on showing to the satisfaction of such court that the same has been lost, injured or destroyed by conflagration or other public calamity, without fault or neglect of the party or person making such application, obtain an order from such court upon notice given as provided in sections ten hundred and ten to ten hundred and seventeen inclusive of the Code of Civil Procedure, authorizing such defect to be supplied by a duly certified copy of such original, where the same can be obtained, which certified copy shall thereafter have the same effect in all respects as such original would have had.

SEC. 2. Whenever in any action or special proceeding, civil or criminal, in any court of this state any judgment, decree, order, document, record, paper, process or file, or any part thereof, shall have been or shall hereafter be lost, injured or destroyed by reason of conflagration or other public calamity, and such defect cannot be supplied as provided in the last section any party or person interested therein may make written application to the court to which the same belongs, verified by affidavit or affidavits, showing such loss, injury or destruction, and that certified copies thereof cannot be obtained by the party or persons making such application, and that such loss, injury or destruction occurred by conflagration, or other calamity, without the fault or neglect of the party making such application, and that such loss, injury or destruction, unless supplied or remedied will or may result in damage to the party or person making such application, and thereupon such court shall cause notice of such application to be given, as provided in sections ten hundred and ten to ten hundred and seventeen inclusive of the Code of Civil Procedure. If, upon such hearing the court shall be satisfied that the statements contained in such written application are true, the court shall make an order reciting what was the substance and effect of such lost, injured or destroyed judgment, decree, order, document, record, paper, process or file, which order shall have the same effect that such original would have had if the same had not been lost, injured or destroyed, so far as concerns the party or persons making such application, and the persons who shall have been notified, as provided for in this section. The judgment, decree, order, document, record, paper, process, or file in all cases where the proceeding is *in rem*, including probate, guardianship and insolvency proceedings, may be supplied in like manner upon like notice to all persons who have appeared therein, and notice by publication or postings to all persons who have not appeared for not less than ten days, as the court may order, and the same when restored shall have the same effect upon all persons who have been personally served with notice of such application as the original, and as to all other persons the same shall be prima facie evidence of the contents of such original.

SEC. 3. If an appeal shall have been taken in any action or special proceeding in any superior court in which the record shall have been subsequently lost or destroyed by conflagration or other public calamity, to a district court of appeal or to the supreme court, and a transcript of such record has been filed in such district court of appeal or in the supreme court, any party or person interested in the action or special proceeding may obtain a certified copy of such transcript, or of any portion thereof, from the clerk of the district court of appeal,

attested by the presiding judge thereof, or from the clerk of the supreme court, attested by the chief justice, and may file such certified and attested copy of such transcript or of any part or portion thereof in the office of the clerk of the superior court from which such appeal was taken. Thereupon such certified and attested copy of such transcript or of any part or portion thereof may be made the basis of any further proceedings or processes in such superior court in such action or special proceeding to all intents and purposes as if the original record so copied, certified and attested, or the part or portion thereof so copied, certified and attested, were on file.

SEC. 4. This act shall take effect immediately.

CHAPTER 56.

An act to add a new section to the Political Code to be known and numbered as section forty-two hundred and forty-eight, relating to county and city and county recorders' offices, and to the recording of instruments therein, the record of which has been, or shall hereafter be, lost, injured or destroyed by conflagration or other public calamity.

[Approved June 16, 1906.]

The people of the State of California, represented in senate and assembly, do enact as follows:

SECTION 1. The Political Code of the State of California is hereby amended by adding thereto a new section to be numbered and known as section forty-two hundred and forty-eight, and to read as follows:

4248. Subdivision 1. Whenever any record of any instrument has been, or shall hereafter be, lost, injured or destroyed by conflagration or other public calamity, the recorder of such county, or city and county is hereby authorized and directed to record any instrument of writing entitled to record under the provisions of Article VII, Chapter V, Part IV, of this code, which instrument of writing had been previously recorded in his office. In recording the same, the recorder shall record all certificates attached thereto and all endorsements thereon, and if any of such certificates or endorsements show the previous recording of same in the county, or city and county, where said instrument is presented for record, the date appearing in such certificate or instrument of such record shall be deemed and taken as the date of the recording thereof in said county or city and county, where said instrument is presented for record. Such record and certified copies thereof, duly certified by the recorder of any such county, or city and county, under his seal of office, may be introduced in evidence, with the same force and effect as the original record or certified copies of the original record.

Subdivision 2. Whenever any record of any instrument has been, or shall hereafter be, lost, injured or destroyed by conflagration or other public calamity, the recorder of such county, or city and county is hereby authorized and directed, when presented to him for record, to record any instrument of writing entitled to record under the provisions of Article VII, Chapter V, Part IV, of this code, which said

instrument of writing shall have been or shall be duly certified by the recorder of any other county, or city and county, of this State as being of record in his office. In recording the same, the recorder shall record all certificates attached thereto, or endorsements thereon, and if any of such certificates or endorsements show the previous recording of the same in the county, or city and county, where the said certified copy of the said instrument is presented for record, the date appearing in such certificate or endorsement of such record shall be deemed and taken as the date of the recording thereof in said county, or city and county recorder's office, where the said certified copy is so presented for record. Said record and certified copies of any such record, duly certified by the recorder of any such county, or city and county, under his seal of office, may be introduced in evidence with the same force and effect as the original record or certified copies of the original record.

Subdivision 3. Such county, or city and county recorder shall be entitled, for his services hereunder, to receive the same amount of fees as he is entitled to receive for the recording of instruments of like character.

SEC. 2. This act shall take effect immediately.

CHAPTER 60.

An act to provide for the reproduction of the register of the Board of Medical Examiners, the Board of Dental Examiners, or the Board of Pharmacy, where the same has been destroyed by conflagration or other public calamity.

[Approved June 16, 1906.]

The people of the State of California, represented in senate and assembly, do enact as follows:

SECTION 1. Whenever the register or book of registration of the Board of Medical Examiners of the State of California, the Board of Dental Examiners of California, or the Board of Pharmacy, has been or may hereafter be destroyed by fire or other public calamity, the board whose duty it is to keep such register or book is hereby authorized to reproduce such register or book so that the same may show as nearly as possible the record existing in the original register or book at the time of such destruction.

SEC. 2. For the reproduction of the destroyed register or book the board shall make use of such existing official printed registers, books, or matter, certificates, affidavits to be presented, or other official information as may be available and which may appear to said board to be authentic, and upon the completion of the said reproduction said board shall by resolution adopt such reproduced register or book as the register or book of said board, and thereafter the same shall be taken and used to all intents and purposes as well for evidence as otherwise as if the same were the original register or book.

SEC. 3. This act shall take effect immediately.

unknown to the corporation or any of its officers, within forty-eight hours after the filing of said petition, a copy of said notice shall be mailed to each of the persons affected by said petition or proceeding whose place of residence or place of business is unknown to said corporation or any of its officers, addressed to them, postage prepaid, at the county seat of the county, or county and city, where the place of business of said corporation is located. In addition to the notice by publication, the petitioner shall address a copy of said notice to each of the stockholders of said corporation, and also to each of the persons affected by said petition, whose names and places of residence or business are known to the corporation or any of its officers, at his place of business or residence, postage prepaid, which notice shall be mailed to such stockholders or persons within forty-eight hours after the filing of said petition. The court before proceeding to hear the case, shall require proof to be made that notice has been published and given as hereinbefore required and service of such notice personally if the same has been so served and if the same has not been so served, an affidavit of the petitioner stating the reasons why such personal service has not been made, shall also be then filed. Upon the completion of said publication, said court shall have jurisdiction to inquire into and determine the loss, injury or destruction of such minutes, records, seal, assessment book, stock journal, stock ledger, certificate book, certificates of stock or bonds, or other papers and documents, and to fix and determine by its judgment or decree, the ownership of said certificates of stock or bonds and the persons entitled thereto, and to direct such corporation to restore its records, seal, assessment book, stock journal, stock ledger, certificate book, certificates of stock or bonds or any other paper or record so lost, injured or destroyed, and to issue new bonds or certificates of stock or other paper or document to any person or persons to whom the same may belong or who may be entitled thereto, as determined by the judgment of the court. Any stock, bond or other paper, the ownership of which can not be determined, shall be found by the court, by its judgment, to belong to unknown owners, and in all proceedings of such corporation, including proceedings for assessment of stock, and the collection of such assessment, and the payment of dividends, and notice of sale and sale for delinquent assessments, said stock or dividends shall be so designated as belonging to unknown owners, without giving the name of the owner thereof or the number of the certificate or series or issue.

SEC. 2. This act shall take effect immediately.

CHAPTER 64.

An act adding a new section to the Civil Code to be known as section 3415, providing for the proof, establishment, re-issuance, re-execution, and re-acknowledgment of private documents and instruments in writing, where the same have been lost or destroyed by conflagration or other public calamity.

[Approved June 18, 1906.]

The people of the State of California, represented in senate and assembly, do enact as follows:

SECTION 1. A new section is hereby added to the Civil Code to be known as section 3415 to read as follows:

3415. An action may be maintained by any person interested in any private document or instrument in writing, which has been lost, destroyed or damaged by conflagration or other public calamity, to prove, establish, compel the re-issuance, re-execution, and re-acknowledgment of such document or instrument. If such document or instrument be a negotiable instrument, the court must compel the person in whose favor it is drawn to give a bond executed by himself and two sufficient sureties to indemnify the person re-issuing, re-executing, or re-acknowledging the same against any lawful claim thereon.

SEC. 2. This act shall take effect immediately.

CHAPTER 93.

An act to add a new section to the Civil Code of the State of California to be known as number 329, relating to lost or destroyed bonds of a corporation.

[Approved March 6, 1907.]

The people of the State of California, represented in senate and assembly, do enact as follows:

SECTION 1. A new section is hereby added to the Civil Code to be numbered section three hundred and twenty-nine and to read as follows:

329. Whenever a bond or bonds of a corporation organized under the laws of this State or of any other State, or any Territory of the United States has or have been lost or destroyed in this State by fire, earthquake, or other calamity, the owner thereof may bring an action against such corporation and the trustee or mortgagee of such bonded indebtedness in the superior court of the county in which such bond or bonds were lost or destroyed, or in which owner resides, or in which is located the principal place of business of such corporation for the purpose of obtaining a new or duplicate bond or bonds. If said bond or bonds stand in the name of, or are registered in the name of a person other than the plaintiff, or if it appears by the books of the corporation that any other person claims or has some right, title, interest

ILLINOIS BURNT-RECORD ACTS.

An act to provide for the restoration of court records which have been lost or destroyed.

[Approved and in force March 19, 1872. L. 1871-2, p. 650; R. S. 1874, p. 837.]

SECTION 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly:* That whenever the record of any judgment or decree, or other proceeding, of any judicial court of this State, or any part of the record of any judicial proceeding, shall have been or shall hereafter be lost or destroyed, any party or person interested therein may, on application by petition, in writing, under oath, to such court, and on showing, to the satisfaction of such court, that the same has been lost or destroyed without fault or neglect of the party or person making such application, obtain an order from such court, authorizing such defect to be supplied by a duly certified copy of such original record, where the same can be obtained; which certified copy shall, thereafter, have the same effect as such original record would have had, in all respects.

SEC. 2. That whenever the loss or destruction of any such record or part thereof shall have happened or shall hereafter happen, and such defect can not be supplied, as provided in the next preceding section, any party or person interested therein may make a written application to the court to which such record belonged, verified by affidavit or affidavits, showing the loss or destruction thereof, and that certified copies thereof can not be obtained by the party or person making such application, and the substance of the record so lost or destroyed, and that such loss or destruction occurred without the fault or neglect of the party or person making such application, and that the loss or destruction of such record, unless supplied, will or may result in damage to the party or person making such application; and thereupon said court shall cause said application to be entered of record in said court, and due notice of said application shall be given, as in chancery cases, that said application will be heard by said court. And if, upon such hearing, said court shall be satisfied that the statements contained in said written application are true, said court shall make an order, reciting what was the substance and effect of said lost or destroyed record; which order shall be entered of record in said court, and have the same effect which said original record would have had if the same had not been lost or destroyed, so far as concerns the party or person making such application, and the persons who shall have been notified, as provided for in this section. The record, in all cases where the proceeding was *in rem*, and no personal service was had, may be supplied upon like notice, as nearly as may be, as in the original proceeding. The court in which the application is pending may, in all cases in which publication is required, direct, by order or orders, to be entered of record, the form of the notice, and designate the newspaper or newspapers in which the same shall be published.

SEC. 3. In case of the destruction by fire or otherwise of the records,

or any part thereof, of any county court having probate jurisdiction, the judge of any such court may proceed upon his own motion, or upon application in writing of any party in interest, to restore the records, papers and proceedings of this [his] court relating to the estate of deceased persons, including recorded wills and wills probated or filed for probate in said court; and for the purpose of restoring said record, wills, papers or proceedings, or any part thereof, may cause citations to be issued to any and all parties to be designated by him, and may compel the attendance in court of any and all witnesses whose testimony may be necessary to the establishment of any such record or part thereof, and the production of any and all written or documentary evidence which may be by him deemed necessary in determining the true import and effect of the original record, will, paper or other document belonging to the files of said court; and may make such orders and decrees establishing said original record, will, paper, document or proceeding, or the substance thereof, as to him shall seem just and proper; and such judge may make all such rules and regulations governing the said proceedings for the restoration of the record, will, paper, document, and proceeding pertaining to said court, as in his judgment will best secure the rights and protect the interests of all parties concerned.

SEC. 4. That in all causes which have been removed, or shall hereafter be removed, to the Supreme Court of this State, a duly certified copy of the record of such cause remaining in the said Supreme Court may be filed in the court from which said cause was removed, on motion of any party or person or persons claiming to be interested therein; and the copy so filed shall have the same effect as the original record would have had if the same had not been lost or destroyed.

SEC. 5. Whereas, by reason of the recent destruction by fire of the records of the courts of Cook County, a necessity exists for this act to take effect immediately; therefore, this act shall take effect and be in force from and after its passage.

Decisions under Act.

SECTION 1.

Every court of general jurisdiction has inherent power to supply its own lost or defaced records. *Goetz* vs. *Koehler*, 20 Ill. App. 233.

Upon motion to restore to the files a portion of record which has been lost, proof of former existence and present loss of such portion of record is sufficient. Evidence held sufficient. *Goetz* vs. *Koehler*, 20 Ill. App. 223.

Lost summons can be supplied by copy, only by order of court, on notice and proofs. *Long* vs. *Sutter*, 67 Ill. 185.

Recognizance may be supplied like other records when lost. *McElwee* vs. *P.*, 77 Ill. 493.

Seal sufficiently indicated in certified copy by scroll, by word "seal," or by letters "L. S." *Holbrook* vs. *Nichol*, 36 Ill. 161.

On petition to restore records destroyed pending suit, it is sufficient to refile bill as to all defendants who have answered, and to refile

answer of all assigning errors in record. Bill need not be refiled, as parties permitted to file supplemental and cross-bill. *Chickering* vs. *Fullerton*, 90 Ill. 520.

Judgment creditor, who is entitled to receive proceeds of judgment, is entitled to restoration of record of judgment. *Russell* vs. *Tillja*, 90 Ill. 327.

Petition need not allege that damage will result from failure to restore such record. Plaintiff can not collect his claim until record is restored. *Russell* vs. *Tillja*, 90 Ill. 327.

Prior to above statute, held that application to restore lost files in case, e. g., affidavits, is addressed to discretion of court. Court must be satisfied of loss of original, and that substitute is true copy. *Troy* vs. *Reilley*, 4 Ill. (3 Scam.) 259.

Prior to passage hereof, equity would not entertain bill to restore record,—remedy by motion at law being complete. *Fisher* vs. *Sievres*, 65 Ill. 99.

Whole record should be substantially restored. Cause should be shown for omission of part. *Vail* vs. *Inglehart*, 69 Ill. 332; *Kehoe* vs. *Rounds*, 69 Ill. 351.

Relief under this act, where records lost, cumulative. Right to prove records by secondary evidence remains. *Beveridge* vs. *Chetlain*, 1 Ill. App. 231.

To surety on bond, who was not notified of proceedings to restore record, record as restored was a nullity. But original record may be proved against him by secondary evidence. *Beveridge* vs. *Chetlain*, 1 Ill. App. 231.

Investigation limited to inquiry, what was substance of record sought to be restored? Record includes pleadings and process. *Vail* vs. *Inglehart*, 69 Ill. 332.

Judgment void on face not restored. Otherwise if merely voidable. *Vail* vs. *Inglehart*, 69 Ill. 332.

Statute does not require that evidence before court shall be preserved in record. *McCabe* vs. *Porter*, 73 Ill. 244.

Evidence held sufficient to authorize restoration of record of foreclosure suit. *Curyea* vs. *Berry*, 84 Ill. 600.

After twenty-three years an order of adoption *nunc pro tunc* will not be entered on oral evidence where it does not appear that any suit was pending or that any papers were ever filed in the case. *Tynan* vs. *Weinhard*, 153 Ill. 598.

Section 3.

In proceeding by executor to sell land, order restoring lost certificate of publication without notice is void. *Harris* vs. *Lester*, 80 Ill. 307.

Record of will is admissible in evidence although will appears to be attested by only one witness, where original record destroyed by fire was restored by commission under Act of 1843. It will be presumed that court which admitted will to probate and commissioners acted on sufficient evidence, and because this evidence is not preserved the presumption is not overcome. *Grand Tower Transportation Company* vs. *Gill*, 111 Ill. 541.

An act to remedy the evils consequent upon the destruction of any public records by fire or otherwise.

[Approved and in force April 9, 1872. L. 1871-2, p. 652; R. S. 1874, p. 838.]

SECTION 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly:* Whenever it shall appear that the records, or any material part thereof, of any county in this State, have been destroyed by fire or otherwise, any map, plat, deed, conveyance, contract, mortgage, deed of trust, or other instrument in writing affecting real estate in such county, which has been heretofore recorded, or certified copies of such, may be re-recorded; and in recording the same the recorder shall record the certificate of the previous record, and the date of filing for record appearing in said original certificate so recorded shall be deemed and taken as the date of the record thereof. And copies of any such record so authorized to be made under this section, duly certified by the recorder of any such county, under his seal of office, shall be received in evidence and have the same force and effect as certified copies of the original record.

SEC. 2. In any county of this State where the records have been burned or destroyed, as specified in the last section, and any map, plat, deed, conveyance, contract, mortgage, deed of trust, or other instrument in writing affecting real estate in such county, has been recorded in any other county of this State, certified copies of the same, heretofore or hereafter made, may be recorded in such county where the records have been so burned or destroyed, and in recording the same the recorder shall record all certificates attached thereto; and if any of such certificates show the previous recording of the same in the county where the records have been burned or destroyed, the date of filing for record in such county appearing in said certificate so recorded shall be deemed and taken as the date of the record thereof. And copies of any such record, so authorized to be made under this section, duly certified by the recorder of any such county, under his seal of office, shall be received in evidence, and have the same force and effect as certified copies of the original record.

SEC. 3. Whenever in any court of record in this State, or any other State, or in any court of the United States, there are original or certified copies of any deed, conveyance, contract, mortgage, deed of trust, or other instrument in writing affecting real estate in such county, copies thereof, certified by the clerk of such court, under his seal of office, may be made and recorded in such county where the records have been so burned or destroyed, and in recording the same the recorder shall record all the certificates attached thereto; and if any of such certificates show the previous recording of the same in the county where the records have been so burned or destroyed, the date of filing for record in such county appearing in said certificate so recorded shall be deemed and taken as the date of the record thereof. Copies of any such record so authorized to be made under this section, duly certified by the recorder of any such county, under his seal of office, shall be received in evidence, and have the same force and effect as certified copies of the original record.

SEC. 4. Whenever the public record of any plat or map, which is

required by law to be kept by the recorder of deeds, has been or may hereafter be injured or destroyed by fire or otherwise, it shall be the duty of the state's attorney of the county in which such injury, loss or destruction has occurred or shall occur, forthwith to file in the circuit court an information in the name of the People of the State of Illinois, setting forth substantially the fact of such injury, loss or destruction, with the circumstances attending the same, as near as may be; and thereupon the clerk of such court shall cause such information to be published in full in one or more public newspapers published in such county, for the period of four weeks, together with a notice addressed to "all whom it may concern," that the court will, at a term therein designated, to be held not less than four weeks from the first publication of such information and notice, proceed to hear and determine the matters in said information set forth, and will take testimony for the purpose of reproducing and re-establishing such records of maps and plats as the court shall find to be injured, lost or destroyed. Upon such publication being made, all persons interested shall be deemed defendants, and may appear in person or by counsel, and be heard touching such proceedings. If the court shall be satisfied that any public record of maps and plats has been injured, lost or destroyed, an order to that effect shall be entered of record, and thereupon the court shall proceed to take testimony for the purpose of reproducing and re-establishing the record so injured, lost or destroyed. The proceedings may be continued from time to time, whether in term or not, and orders and decrees shall be made as to each map or plat separately. The clerk shall cause all maps and plats adjudged by the court to be correct copies of the records injured, lost or destroyed, as often and as soon as they are so adjudged, to be filed in the office of the recorder of deeds, with a certified copy of the order or judgment of the court in the premises attached thereto, and recorded in a book or books to be provided for that purpose. And the said record shall be deemed and taken in all courts and places as a public record, and as a true and correct reproduction of the original record so injured, lost or destroyed.

SEC. 5. All costs and expenses incurred in the proceeding under the last preceding section, including copies of maps and plats and recording of the same, shall be taxed as costs against the county in which such proceedings are had.

SEC. 6. Whenever it shall appear that the records or any material part thereof of any county in this State have been destroyed by fire or otherwise, so that a connected chain of title can not be deduced therefrom, copies duly certified by the proper officers, of all deeds, patents, certificates, plats and legal subdivisions of lands in such county in the custody or control of any officer of this State or the United States, may be recorded in the recorder's office of such county; and the record so made shall have the same force and effect as the record of the originals of such instruments.

SEC. 7. It shall be the duty of the county board of such county, as soon as may be, to procure from the United States authorities at Washington, Springfield or elsewhere, all maps, tract books or official entries or properly authenticated copies thereof as relate to any of the lands in such county, and cause the same to be recorded in the recorder's office of such county.

SEC. 8. It shall be the duty of the judges of the Circuit Court of the county, or the judges of the Circuit and Superior Courts of Cook County, to examine into the state of the records in such county, and in case they find any abstracts, copies, minutes or extracts from said records existing after such destruction as aforesaid, and find that said abstracts, copies, minutes or extracts were fairly made before the destruction of the records by any person or persons, in the ordinary course of business, and that they contain a material and substantial part of said records, the said circuit judge of the county, or the judges of the Circuit or Superior Courts of Cook County, shall certify the facts found by them in respect to such abstracts, copies, minutes and extracts, and the said judges of said county, or the judges of the Circuit or Superior Courts of Cook County, shall cause all evidence produced as to said abstract books to be reduced to writing, and shall cause all such evidence to be spread of record, as a part of the order of said court. And also (if they are of that opinion), that such abstract, copies, minutes and extracts tend to show a connected chain of title to the land in said county, and upon filing of a certificate of such circuit judge or the judges of the Circuit and Superior Courts of Cook County, with the county clerk of the proper county, the county board may, with the approval of the judge of the Circuit Court of the county or the judges of the Circuit and Superior Courts of Cook County, purchase from the owners thereof such abstract, copies, minutes or extracts, or such part thereof as may tend to show a connected chain of title to the land in such county, including all such judgments and decrees as form part of any such chain of title, paying therefor such fair and reasonable price as may be agreed upon between them and such owners; the amount thus agreed to be paid for such abstracts, copies, minutes or extracts shall be paid by such county in money or in bonds, to be issued by said county as the county board may determine, or such county board may, with said approval, procure a copy of said extracts, copies, minutes and extracts, instead of the original, to be paid for in like manner: *And it is further provided*, that any owner of said abstracts, copies or minutes shall have the right to file a petition at any regular term of the Circuit Court of the proper county, in which petition he or they shall set forth the manner in which such abstracts, copies or minutes were made or procured, and if the court shall find from the evidence produced (which evidence shall be preserved as hereinbefore provided) that said abstracts, copies or minutes were fairly made in the regular course of business before such destruction of the records, the court shall enter his decree to that effect, and the evidence produced on the trial of said cause entered of record at large as a part of the decree of the court. And thereupon said abstracts, copies or minutes of said burnt records shall be taken as *prima facie* evidence of all such matters as they contain (but no such abstracts, copies, minutes or extracts shall be taken or held to be *prima facie* evidence of what they contain that does not purport to recite all deeds and mortgages previously executed and recorded, and describing the several tracts of lands and town lots to which said abstracts, copies, minutes or extracts refer from the date of entry): *Provided, further*, that all abstracts to separate tracts of lands made by the owner of said abstracts, copies, minutes or extracts shall also be taken and held as *prima facie* evidence of what they contain when they shall be accompanied with an affidavit

you appear at the ——— term of said court, (naming the first term after thirty days from the first insertion of said notice), and show cause against said application, said petition shall be taken for confessed and the title or interest of said petitioner will be decreed and established according to the prayer of said petition, and you forever barred from disputing the same.

G P, Solicitor. E F, Petitioner.

Said notice shall be published once a week for four weeks successively, the first insertion to be at least thirty days prior to said term of court, and the several publications shall all be in the same newspaper in said county, or if there is no newspaper published in said county, then in a newspaper published in one of the counties nearest thereto. The clerk of the Circuit Court of such county shall advertise for bids for publishing said notices, (said advertisement to be inserted one week in at least two of the principal newspapers in such county or the adjoining counties, to be selected by the judge or judges of the Circuit Court in said county), and the publishing of said notices shall thereupon be awarded by said judge or judges to the newspaper making the lowest bid therefor; or if there are two or more making the same bid, then said judge or judges shall determine to which of them said publishing shall be awarded, said award to be by order of said court entered of record therein; and a copy of such order, certified by the clerk of said court under the seal thereof, shall be transmitted to and entered of record in any other court in such county having chancery jurisdiction before which proceedings under this section may be had. All publications provided for in this section shall be made in the newspaper so designated. Said newspaper shall not be changed unless the judge or judges of said court shall, for good cause, in their discretion, decide to change the same; in which case another paper shall be selected in like manner, and the order naming or changing said paper shall be entered of record as aforesaid.

SEC. 13. Any person interested may oppose any such petition, and file his demurrer or answer thereto on or before the third day of the term of court named in said publication notice, unless the time be extended by order of court, and may also file a cross petition if he or she desires to do so. Said answer shall admit, confess and avoid or transverse all the material allegations of the petition, and shall, except when made by guardians *ad litem*, be verified by the affidavit of either the respondent or his agent, in the same manner as above required on cases of the petition. Said answer shall have no other nor greater weight as evidence than the petition.

SEC. 14. If no demurrer or answer shall be filed by the third day of said term, or by the day allowed by the order of said court, as above provided, the petition may be taken for confessed, and a decree entered according to the prayer of said petition, upon proof of the facts stated in said petition; but if any person shall file an answer, as aforesaid, to such petition, the court may hear evidence, or order a reference to a master in chancery or special commissioner, to take evidence and report when the same proceedings shall be had as on a reference to a master in chancery under and according to the practice in courts of chancery in this State. If the petition includes more than one parcel of land, and no demurrer or answers shall be filed as to some of said parcels, the

court may enter a decree, *pro confesso*, as to those parcels as to which no demurrer or answer shall be filed, and hear evidence, or order a reference as to the remaining parcels.

SEC. 15. It shall be competent for said courts, in all such decrees, whether *pro confesso*, or on the report of any master or special commissioner, or otherwise, to determine and decree in whom the title in any or all of the lands described in said petition is vested, whether in the petitioner or in any other of the parties before the court; but said decree shall not in anywise affect any lien or liens to which said fee may be subject, and which have been created since the destruction of such records, whether the same be by mortgage, deed of trust, judgment, statute, mechanic's lien or otherwise, but shall leave all such liens to be ascertained or established in some other proceeding, or to be enforced, as the parties holding them may see fit. [As amended by L. 1887, p. 260, June 15, July 1.]

SEC. 16. Said decree of said court, when entered, shall be forever binding and conclusive: *Provided*, that any decree shall be subject to be opened, modified, vacated or set aside on appeal or writ of error sued within two years after the entry of such decree: *And, provided, further*, that insane persons and minors shall have two years after their disabilities are removed to prosecute a writ of error upon said decree: *Provided, further*, that any decree entered upon any petition or cross petition, which does not make defendant, by name, all persons who shall be in possession of such lands or any part thereof, at the time of the filing of such petition, or which does not make defendant, by name, all persons to whom any such lands shall have been conveyed, and the deed or deeds of such conveyance shall have been recorded in the office of the recorder of deeds of such county since the time of the destruction of the records, as aforesaid, and prior to the time of the filing of any such petition, shall be absolutely void as to such person omitted, but shall be final and conclusive as to all others: *And, provided, further*, that all defendants who shall not be actually served with a summons in the suit in which such decree may be rendered, shall have allowed to them one year after the entry of such decree within which, upon petition to the court rendering the same, to have the said decree vacated and set aside in the same manner as is now allowed to defendants under Section 19, of Chapter 22, of the Revised Statutes, entitled "Chancery." [As amended by L. 1887, p. 261, June 15, July 1.]

SEC. 17. Whenever any deeds or other instruments, in writing, affecting the title to any of the lands in any such county, shall have been filed for record so short a time before such destruction of the records, as aforesaid, that no proof of them remains either on such records, or among the abstracts, copies, minutes or extracts specified in section eight of this act, it shall be the duty of the person or persons having filed the same or claiming the benefit thereof, within sixty days from the time this act takes effect, to refile for record such deeds or other instruments or copies thereof, or if that can not be done, then he shall, within sixty days, make and file a petition to establish such deed or other instrument of writing, under the provisions of this act. In all cases when any original deed and the record thereof has been lost or destroyed, [it shall be lawful for any person having] a duly certified copy of said record to cause the same to be recorded, which record shall

have the same force and effect as now belong to the record of original deeds.

SEC. 18. No tax deed or certificate of tax sale based on any proceedings, the record of which shall appear to have been destroyed as aforesaid, shall be received in any of the courts of this State as *prima facie* evidence of the regularity of such proceedings, but the burden of proof shall be upon the person claiming under such deed or certificate to show the regularity and legality of all such proceedings. In order to sustain the validity of any tax deed or sale for any tax or taxes, assessment or assessments, in any county to which the provisions of this act are applicable, in any suit or proceeding whatsoever, it shall be necessary for the party relying upon any such deed or sale to show, affirmatively, that each and all of the provisions of law, in respect to assessment, levy, sale and deed of the lands affected or to be affected by any such deed or sale as aforesaid, have been in all respects complied with—and no presumption shall be indulged in favor of any such tax deed or sale; and it shall not be sufficient to show a collector's report, notice, judgment, order of sale, sale notice, notice of sale, tax affidavit, and deed, [anything] in this law or in any other law of this State to the contrary notwithstanding.

SEC. 19. Executors, administrators, conservators, guardians and trustees shall be entitled to proceed under this act in behalf of the interests and rights they represent.

SEC. 20. The judges of courts having chancery jurisdiction in such county shall have power to appoint as many special commissioners from time to time as they may deem necessary to carry out the provisions of this act, in addition to the masters in chancery of said courts, who shall be *ex officio*, such special commissioners, to take evidence and report all such petitions as may be referred to them. The fees of all masters in chancery, commissioners, clerks, sheriffs and all officers and employees, for services under this act, shall not, in any case, exceed two thirds of the fees now or hereafter provided by law for the same services.

SEC. 21. The word "person," when used in this act, shall include persons and all bodies politic and corporate.

SEC. 22. The rules and regulations governing courts of chancery in this State shall apply to the proceedings under this act so far as they are not inconsistent herewith.

SEC. 23. In all cases under the provisions of this act, and in all proceedings or actions now or hereafter instituted as to any estate, interest or right in or any lien or incumbrance upon any lots, pieces or parcels of land, when any party to such action or proceeding, or his agent or attorney in his behalf, shall orally in court, or by affidavit, to be filed in such action or proceeding, testify and state under oath that the original of any deeds, conveyances or other written or record evidence, has been lost or destroyed, or not in the power of the party wishing to use it on the trial to produce the same, and the record thereof has been destroyed by fire or otherwise, the court shall receive all such evidence as may have a bearing on the case to establish the execution or contents of the deeds, conveyances, records, or other written evidence, so lost or destroyed: *Provided*, that the testimony of the parties themselves shall be received subject to all the qualifications in respect of such

testimony which are now provided by law: *And, provided, further,* that any writings in the hands of any person or persons which may become admissible in evidence, under the provisions of this section or of any other part of this act, shall be rejected and not be admitted in evidence unless the same appear upon its face without erasure, blemish, alteration, interlineation or interpolation in any material part, unless the same be explained to the satisfaction of the court, and to have been fairly and honestly made in the ordinary course of business; and that any person or persons making any such erasure, alteration, interlineation or interpolation, in any such writing, with the intent to change the same in any substantial matter, after the same has been once made as aforesaid, shall be guilty of the crime of forgery, and be punished accordingly; and that any and all persons who may be engaged in the business of making writings or written entries concerning or relating to lands and real estate, in any county in this State to which this act applies, and of furnishing to persons applying therefor abstracts and copies of such writings or written entries as aforesaid, for a fee, reward or compensation therefor, and shall not make the same truly and without alteration or interpolation, in any matter of substance, with the view and intent to alter or change the same in any material matter, or matter of substance, shall be guilty of the crime of forgery, and punished accordingly; and any and all such person or persons shall furnish said abstracts or copies as aforesaid, to the person and persons from time to time applying therefor, in the order of applications and without unnecessary delay, and for a reasonable consideration to be allowed therefor, which in no case shall exceed the sum of one dollar and fifty cents for each and every conveyance, or other like change of title, shown upon such abstract or copy; and any and all persons so engaged, and whose business is hereby declared to stand upon a like footing with that of common carriers, who shall refuse so to do, if tender or payment be made to him or them of the amount demanded for such abstract or copy, not exceeding the amount aforesaid, as soon as such amount is made known, or ascertained, or of a sum adequate to cover said amount before its ascertainment, shall be guilty of the crime of extortion, and be punished by a fine of not less than one hundred dollars, and not exceeding one thousand dollars therefor, upon indictment in any court having jurisdiction thereof, and shall also be liable in an action on the case, or other proper form of action or suit, for any and all damages, loss or injury which any person or persons applying therefor may suffer or incur by reason of such failure to furnish such abstract or copy as aforesaid. [As amended by L. 1873-4, p. 132, March 30.]

SEC. 24. Whenever, upon the trial of any suit or proceeding which is now or hereafter may be pending in any court of this State, any party to such proceeding, or his agent or his attorney, in his behalf, shall orally in court, or by affidavit to be filed in such cause, testify and state under oath that the originals of any deeds or other instrument in writing, or records of any court relating to any lands, the title or any interest therein, being in controversy in such suit or proceeding, are lost or destroyed, or not within the power of the party to produce the same, and that the records thereof are destroyed by fire or otherwise, it shall be lawful for such party to offer, and the court shall receive, as

evidence, any abstract of title, or letter-press copy thereof, made in the ordinary course of business prior to such loss or destruction, and it shall also be lawful for any such party to offer, and the court shall receive, as evidence, any copy, extracts or minutes from such destroyed records, or from the originals thereof, which were, at the date of such destruction or loss, in the possession of persons then engaged in the business of making abstracts of title for others for hire. A sworn copy of any writing admissible under this section made by the person or persons having possession of writings, shall be admissible in evidence in like manner, and with like effect, as such writing, provided the party desiring to use such sworn copy as evidence shall have given the opposite party a reasonable opportunity to verify the correctness of such copy. [As amended by L. 1887, p. 261, June 15, July 1.]

Decisions under Act.

GENERALLY.

This act is made remedial, and applies to all cases which, by fair construction of its terms, it can be made to reach. *Smith* vs. *Stevens*, 82 Ill. 554.

Constitutionality of this act affirmed. *Bertram* vs. *Taylor*, 86 Ill. 235; *Heacock* vs. *Lubuke*, 107 Ill. 396.

Burnt-Records Act not unconstitutional in not providing for jury trial. It is an enlargement and regulation of equitable rights and procedure in equity. *Gormley* vs. *Clark*, 134 U. S. 338.

Decree declaring null an ordinance vacating a plat, enforcing rights according to plat, directing parties to remove obstructions from streets, and in default thereof that marshal remove the same and give possession to petitioner, whose title is established by decree—all without jury trial—*held* authorized hereby. *Gormley* vs. *Clark*, 134 U. S. 338.

Procedure under Burnt-Records Act may be administered in Federal courts as well as state courts. *Gormley* vs. *Clark*, 134 U. S. 338.

Burnt-Records Act is in effect a statute of limitations. *Gormley* vs. *Clark*, 134 U. S. 338.

The statute does not contravene Constitution of 1870, Article II, Section 5, which provides that trial by jury as heretofore enjoyed shall remain inviolate. *Heacock* vs. *Hosmer*, 109 Ill. 245; *Harding* vs. *Fuller*, 141 Ill. 308 (1892).

SECTION 1.

Destruction of record of conveyance, trust deed or mortgage does not alter effect of record as notice to subsequent purchasers. *Shannon* vs. *Hall*, 72 Ill. 354; same case, 85 Ill. 473; *Gammon* vs. *Hodges*, 73 Ill. 140; *Steele* vs. *Boone*, 75 Ill. 457; *Heaton* vs. *Prather*, 84 Ill. 330; *Curyea* vs. *Berry*, 84 Ill. 600.

Section applied in suit under this to quiet title. *Fitch* vs. *Wetherbee*, 110 Ill. 475.

SECTION 6.

Abbreviations in extracts or minutes will not render the same incompetent, but the same may be explained by parol evidence. *Converse* vs. *Ward*, 142 Ill. 132 (1892).

Extracts or minutes from destroyed records, or the originals thereof, are admissible in evidence without showing that no ante-fire abstract of title is in existence. *Converse* vs. *Ward*, 142 Ill. 132 (1892).

SECTION 10.

Petition in burnt-record proceeding is to be filed in any court having chancery jurisdiction. *Gage* vs. *Du Puy*, 127 Ill. 216.

Two kinds of petition authorized: (1) to establish title; (2) to establish lien. *Mulvey* vs. *Gibbons*, 87 Ill. 367.

Petition should state contents of alleged record substantially, but need not *in haec verba*. Allegations of record of judgment on *cognovit*, *held* sufficient. *Russell* vs. *Lillja*, 90 Ill. 327.

If judgment was on *cognovit*, name of attorney entering *cognovit* need not be alleged. *Russell* vs. *Lillja*, 90 Ill. 327.

Allegations as to record of judgment confessed, showing that court has jurisdiction of *res* and of parties, and gave judgment on confession for given amount and awarded execution, sufficient. *Russell* vs. *Lillja*, 90 Ill. 327.

More formal allegations necessary as to destruction of record in pending suit than where judgment has been obtained. *Russell* vs. *Lillja*, 90 Ill. 327.

Limitation applies to cases determined in Appellate Court as well as to those which may be taken from Circuit to Supreme Court. *McClure* vs. *Walker*, 103 Ill. 544.

Proceedings on petition stated. *Miller* vs. *Shaw*, 103 Ill. 277.

Petitioner need not be in possession. *Heacock* vs. *Lubuke*, 107 Ill. 396.

Above cited. *Smith* vs. *Hutchinson*, 108 Ill. 662.

Jury trial not contemplated by the statute, nor is it indispensable to the relief in view. *Colver* vs. *Colehour*, 115 Ill. 558, following similar cases of *In re Ferrier*, 103 Ill. 367; *Ward* vs. *Farwell*, 97 Ill. 593; *Heacock* vs. *Hosmer*, 109 Ill. 245.

Petition *held* to contain all that statute requires. *Heacock* vs. *Hosmer*, 109 Ill. 245.

If it is sought to have tax deeds set aside as clouds, petition should set out the defects in such deeds and in the proceedings on which such deeds are based. *Gage* vs. *McLaughlin*, 101 Ill. 155.

The two years' limitation in Section 5057, Revised Statutes of the United States, will be a bar to a suit by the grantee of an assignee in bankruptcy, in so far as the bill seeks to have the tax title set aside. Where the mere restoration of the records alone is sought, the limitation of the Bankrupt Act can have no application. *Gage* vs. *Du Puy*, 127 Ill. 216.

It is objected that the petition is insufficient to warrant the court in finding the tax deeds void, for the reason that it does not aver the

invalidity of such tax deeds, as is required to be done in bills to remove tax deeds as clouds upon titles, and proof thereof was not made by the petitioner. The position is untenable. All that is required in respect of adverse claimants or their titles is that such claimant shall be named in the petition and made defendant. Nothing more is required to give the court jurisdiction, under the statute, to investigate all claims of title to the premises and by its decree establish the title in the person in whom it is to be vested. *Gage* vs. *Caraher,* 125 Ill. 447.

Possession for less than twenty years will not prevail against title of which record was destroyed by fire. Abstract of title is admissible as against person in possession for less period. *Smith* vs. *Stevens,* 82 Ill. 554.

Right to file a petition is not affected by the fact that the defendant may be in possession of the premises. *Harding* vs. *Fuller,* 141 Ill. 308 (1892).

Petitioner ought to set out fully his chain of title in his petition. *Harding* vs. *Fuller,* 141 Ill. 308 (1892).

Adverse claims existing is not an objection to proceeding under this act. *Harding* vs. *Fuller,* 141 Ill. 308 (1892).

Proof of title antecedent to the possession need not be shown where there is perfect possessory title proven. *Gage* vs. *Gentzel,* 144 Ill. 450 (1893).

Destruction of evidences of chain of title need not be proved, but only that the records or any material part have been destroyed by fire, so that a connected chain of title could not be deduced. *Gage* vs. *Gentzel,* 144 Ill. 450 (1893).

Title will not be restored where the rights of third parties have accrued under the statute of limitations, and where such restoration would only cast a cloud upon the title of such parties, and would not benefit petitioner. *Beattie* vs. *Whipple,* 154 Ill. 273 (1894).

Section 11.

All persons claiming to own the premises in fee, and all persons to whom any conveyance thereof has been made and the deeds recorded since the destruction of the records, must be made defendants in a petition to confirm title. *Gage* vs. *Du Puy,* 134 Ill. 132 (1890).

A remainderman not made a party to a bill to foreclose is bound by a decree where his joint remaindermen were represented at the hearing. *McCampbell* vs. *Mason,* 151 Ill. 500 (1894).

Persons before the court by representation are bound by its decree although not made parties, e. g., contingent remaindermen. *McCampbell* vs. *Mason,* 151 Ill. 500 (1894).

A petition may be maintained for the restoration of the record of one deed. It is not necessary that there be any defendant to such petitions. *Harding* vs. *Fuller,* 40 Ill. App. 643 (1891).

Evidences of title desired to be restored should be specified by petitioner, but appellant, admitting petitioner's obtaining title from the government through mesne conveyances and that the records of such conveyances were destroyed, can not complaint of error. *Harding* vs. *Fuller,* 141 Ill. 308 (1892).

Motives in filing a petition in equity under the Burnt-Records Act will not affect the right. *Harding* vs. *Fuller,* 141 Ill. 308 (1892).

Requisites of bill and practice stated. *Gage* vs. *Gentzel*, 144 Ill. 450.

Burden is on adverse claimants, made defendants, to establish title to the property, and it is unnecessary to set out that the defendants' title was illegal, and wherein it was so. *Gage* vs. *Gentzel*, 144 Ill. 450 (1893).

Suit under the Burnt-Records Act to establish title is a suit in chancery. *Rogers* vs. *Tyley*, 144 Ill. 652 (1892).

The averments of the petition are to be taken most strongly against the party whose pleading it is. *Beattie* vs. *Whipple*, 154 Ill. 273 (1894).

A defendant, as to whom the suit is dismissed on motion of complainant, is no more a party to the action than if he had never been named as a defendant; he is not bound by the decree, and can not maintain a writ of error. *Harms* vs. *Jacobs*, 155 Ill. 221 (1895).

Section 12.

Publication of notice under the form "John N. Hummer and ——— Hummer, his wife," is not sufficient to make the wife a party so as to bar her inchoate dower. *Goodkind* vs. *Bartlett*, 153 Ill. 419 (1894).

Section 14.

Tax title should be set aside only on equitable terms. *Smith* vs. *Hutchinson*, 108 Ill. 662.

Under statute, petitioner must prove title in himself, but he need not prove absence of title in defendants. *Smith* vs. *Hutchinson*, 108 Ill. 662.

Those cases in which this section does not provide that evidence shall be given in support of petition are governed by general rules of chancery practice; e. g., allegations of petition admitted to be true by demurrer need not be supported by evidence. *Heacock* vs. *Hosmer*, 109 Ill. 245.

Decree setting aside tax deeds, conditioned upon the payment of taxes and interest, is proper. *Gage* vs. *Gentzel*, 144 Ill. 450 (1893).

Decree is conclusive against holder of tax deed asserting any rights under the same, where he fails to assert them in the trial, or introduce any evidence as to his taxes. *Gage* vs. *Gentzel*, 144 Ill. 450 (1893).

Section 16.

Jurisdiction.

Court may examine all interest in title and determine it by decree as to all persons known or unknown. *Mulvey* vs. *Gibbons*, 87 Ill. 367.

Under the statute, court is authorized to decree in favor of better title. *Robinson* vs. *Ferguson*, 78 Ill. 538; *Covington* vs. *East St. Louis*, 78 Ill. 538.

Chain of canceled mortgages will not be restored. *Strong* vs. *Shea*, 83 Ill. 575.

Cited. *Mulvey* vs. *Gibbons*, 87 Ill. 367.

Petitioner may not only establish his own title in this proceeding, but may make holder of tax title defendant, and have such tax title set aside as cloud. *Smith* vs. *Gage*, 11 Biss. 217.

Jurisdiction of courts of equity is enlarged to include suits brought under the Burnt-Records Act. *Gage* vs. *Du Puy*, 127 Ill. 216.

Court will consider validity of tax title and set aside same upon proper terms in burnt-record proceedings. *Smith* vs. *Gage*, 12 F. R. 32.

In collateral suit (e. g., action of ejectment) title *held* established by decree under this section. *Bradish* vs. *Grant*, 119 Ill. 606.

It is no objection to proceeding under this statute, where the facts alleged and proved bring the case within its provisions, that there are adverse claimants. Whatever may be the power of a court of chancery, where there are controverted titles, to restore by its decree the evidence of title in the respective parties as they were before the destruction of the record, and then in its discretion remit the parties to a court of law to try their titles, it is manifest no such course was contemplated by the statute or necessary in cases under it. *Gage* vs. *Caraher*, 125 Ill. 447.

Admission by one of the defendants as to petitioner's title at the time of the destruction of the records will not prevent the court from taking jurisdiction under this act. *Harding* vs. *Fuller*, 141 Ill. 308 (1892).

Destruction of the records is the fact which authorizes a court of chancery to inquire into the conditions of the title. *Harding* vs. *Fuller*, 141 Ill. 308 (1892).

Power to give possession results from the jurisdiction exercised and the decree. *Harding* vs. *Fuller*, 141 Ill. 308 (1892).

Under this section the court has power to decree who holds title to the land in controversy. *Gage* vs. *Harbert*, 145 Ill. 530 (1892).

The court has power to issue a writ of assistance to put the petitioner into possession of the land which he claims and to which he has proved title. *Gormley* vs. *Clark*, 134 U. S. 338 (1890); *Harding* vs. *Fuller*, 141 Ill. 308 (1892).

General.

Decree can be opened only within twelve months after its rendition. *Bertrand* vs. *Taylor*, 87 Ill. 235.

Reference to the Revised Statutes of 1845, Chapter XXI, Section 15, relates only to proceedings on answer, and to extent and effect of opening. *Bertrand* vs. *Taylor*, 87 Ill. 235.

Provision that decree against married women, etc., shall set forth evidence is applicable only to cases in which decree is based on evidence, not to case where allegations of petition are admitted by demurrer or other admissions of parties. *Heacock* vs. *Hosmer*, 109 Ill. 245.

Requirement that the petitioner himself be in possession would be inconsistent with this section. *Harding* vs. *Fuller*, 141 Ill. 308 (1892).

Decree should show, not what the records showed before they were destroyed, but in whom the title is vested at the time when the decree is rendered. *Gage* vs. *Gentzel*, 144 Ill. 450 (1893).

A record of a deed is, in general, constructive notice of its contents, although the record has been destroyed, but such record does not prevail over the decree of a competent court; and when a lawful decree has been subsequently rendered, incorrectly declaring the contents of the deed, the destroyed record ceases to be constructive notice of those terms which are incorrectly declared. *Franklin Savings Bank* vs.

Taylor, 9 U. S. App. 406 (1893); S. C., 53 F. R. 854 (1893), reversing *Taylor* vs. *Franklin Savings Bank*, 50 F. R. 289 (1891).

SECTION 18.

Provides rule of evidence merely. Is not unconstitutional as impairing obligation of contracts. So though the charter of Chicago gave deeds and certificates such effect. *Roby* vs. *Chicago*, 64 Ill. 447.

This section does not apply to party defending under tax title acquired before passage of act. *Garrick* vs. *Chamberlain*, 97 Ill. 620.

Where petitioner, to confirm title under this act, shows valid title, defendant claiming by tax title has burden of proof hereunder. *Chamberlain* vs. *Sutherland*, 4 Ill. App. 494.

In a proceeding under the Burnt-Records Act, to confirm the title to land as against tax titles, the petitioner will be required to repay the money advanced at the tax sale, and subsequent taxes paid by the holder of such titles, with the legal interest thereon. This rule is based on the maxim "that he who seeks equity must do equity." *Gage* vs. *Caraher*, 125 Ill. 447.

The statute creating the presumption in favor of the regularity of proceedings for the sale of land for taxes, prior to the deed, as it establishes only a rule of evidence, may be changed, and a change in the statute doing away with the presumption, and throwing the burden of proof on the party holding a tax title to show the irregularity of the proceeding, is not unconstitutional, as impairing the obligation of contracts. *Gage* vs. *Caraher*, 125 Ill. 447.

Where a purchaser at a sale upon a special assessment omits to take out his deed within the time limited by statute, and therefore the tax certificate and the sale on which it was based has ceased to be a cloud on the title to the property to which such certificate refers, the petitioner seeking confirmation of his own title will not be required to reimburse the holder of such certificate for the money advanced by him at the assessment sale. *Gage* vs. *Caraher*, 125 Ill. 447.

SECTION 20.

Maximum fees which officers and employees may charge or be allowed for services are only fixed, and this section does not limit the costs in the case to two thirds of the ordinary costs at law. *Rogers* vs. *Tyley*, 144 Ill. 652 (1892).

SECTION 22.

The rules and regulations of courts of chancery apply to the proceedings under this act. *Gage* vs. *Du Puy*, 127 Ill. 216.

Statute cited. *Harms* vs. *Jacobs*, 155 Ill. 221 (1895).

SECTION 23.

Index of records admissible as secondary evidence at common law where record is destroyed. *Alvis* vs. *Morrison*, 63 Ill. 181.

Objections to abstracts offered in evidence hereunder, as offered before proof of conditions necessary to admissibility, must be made at trial. *Carbine* vs. *Pringle*, 90 Ill. 302.

Under statute, neither letter-press copy of abstract of title, nor copy of such letter-press copy, is admissible in evidence. *Compton* vs. *Randolph*, 104 Ill. 555; *King* vs. *Worthington*, 73 Ill. 161.

The recollection of a witness as to the contents of lost or destroyed instruments would clearly be competent under this section, and there is no reason why their recollection might not be refreshed by reference to notes taken by the witnesses, and known to be correct. *Bush* vs. *Stanley*, 122 Ill. 406.

Abstract of deed recorded, though deed be defectively acknowledged, may be introduced in evidence and relied on in proof of title. *Heinsen* vs. *Lamb*, 117 Ill. 549.

Abstract of title, or copies, extracts or minutes of the same, may be used in evidence. *Converse* vs. *Ward*, 142 Ill. 132 (1892).

Particular deeds alleged to be lost do not prevent the introduction of such deeds in evidence, as they may have been found subsequent to filing the bill. *Gage* vs. *Gentzel*, 144 Ill. 450 (1893).

There is no presumption that defendants in an ejectment suit were in actual possession in 1871, but such possession, if it exists, is a matter of defense to be shown by the defendant. *Chicago, etc. R. Co.* vs. *Keegan*, 152 Ill. 413 (1894).

A sworn answer in a suit under the Burnt-Records Act is not evidence as in an ordinary chancery suit, but has no other or greater weight as evidence than the petition. *Miller* vs. *Stalker*, 158 Ill. 514 (1895).

SECTION 24.

An abstract of title admitted in evidence. *Russell* vs. *Mandell*, 73 Ill. 136; *Miller* vs. *Shaw*, 103 Ill. 277.

Abstract of title, made years before by abstracters in course of business, presumed made for owners or purchasers, and admitted. *Richley* vs. *Farrell*, 69 Ill. 264.

Abstract of title is secondary, not original, evidence, and if lost its contents can not be proved by other evidence. *Thatcher* vs. *Olmstead*, 110 Ill. 26.

Abstract of titles is summary of facts relied on as evidence of title. It must contain notes of all conveyances, transfers or other facts relied on as evidences of claimant's title, together with all such facts appearing of record as may impair it. *Heinsen* vs. *Lamb*, 117 Ill. 549.

Case *held* proper for admission of ante-fire abstract, and abstract offered *held* admissible. Abstract made from minutes taken from record, *held* an original, not a copy. *Heinsen* vs. *Lamb*, 117 Ill. 549.

A sworn copy of minutes admissible under this section is properly entitled to be used as evidence by complainant, on proof that such sworn copy was delivered to counsel for defendant at noon on the day before trial and left in his possession until four o'clock of same day, in order that he might verify the correctness of such copy. *Sternheim* vs. *Burchy*, 149 Ill. 241 (1894).

Where loss or destruction of the original deeds and the record thereof has been shown, extracts and minutes made from original deeds on the day they were filed for record, by a firm who were in the business of making abstracts, which minutes were made in the regular course of business and were in possession of such firm when the records were

destroyed, are entitled to be read in evidence. *Sternheim* vs. *Burchy*, 149 Ill. 241 (1894).

Under the conditions imposed by this section, resort may be had to evidence of a twofold character: First, an abstract of title made in the ordinary course of business prior to such loss or destruction or a letter-press copy thereof; second, any copy, extract or minutes from such destroyed records or from the originals of such, which were at the date of such loss in the possession of any person then engaged in the business of making abstracts of title for hire. *Sternheim* vs. *Burchy*, 149 Ill. 241 (1894).

Where it is not proved that the abstracts offered by virtue of this act were made in the ordinary course of business, and prior to the destruction of the originals, they are not admissible, and the burden is on the party offering the abstracts to bring them within the terms of the statute. *Chicago, etc. R. Co.* vs. *Keegan*, 152 Ill. 413 (1894).

To entitle one to introduce an abstract in evidence under the Burnt-Records Act, it is not necessary that any witness should testify from personal knowledge that such abstract was made in the ordinary course of business, prior to the loss of original. *Chicago, etc. R. Co.* vs. *Keegan*, 152 Ill. 413 (1894).

An act to provide for the copying of old or damaged public record books.

[Approved March 26, 1872; in force July 1, 1872.]

SECTION 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly:* That whenever any record book of deeds, mortgages, or other instruments, or any order book, docket, or fee book, records of wills or records of settlements of administrators, executors or guardians, or any other book belonging to any county, which is required by law to be preserved in any public office of the county, for the use or inspection of the public, shall be so much worn, decayed, mutilated, or otherwise damaged, as to endanger the preservation of the records contained in any such book, it shall be lawful for the board of county commissioners or board of supervisors to cause any such book to be copied and transcribed into a new and well-bound book, to be furnished as other record books are furnished.

SEC. 2. Said book or books, when so copied and transcribed, shall be carefully compared with the original book or books from which they were copied, by the persons who shall have done the work, together with some other discreet and skillful person, and when said books are so copied and compared with the originals the persons who have made such examination shall make an affidavit, which shall be incorporated in the book as copied, that said book, and each and every part thereof, is a true copy of the original book and each and every part thereof, that the matter of record which appears upon any page of the original appears also upon the same page of the copy, and that no matter of record appears upon any page of the copy which is not to be found upon the same page of the original.

the jurisdiction of the United States, or in any foreign country; the proof of service of such notice, if made in a foreign country, to be certified by a minister or consul of the United States in such country, under his official seal. [Amended to read as above by act of January 31, 1879, ch. 39, 20 Stat. L. 277.]

§ 903. *Same subject.*

A certified copy of the official return, or any other official paper of the United States attorney, marshal, or clerk, or other certifying or recording officer of any court of the United States, made in pursuance of law, and on file in any department of the government, relating to any cause or matter to which the United States was a party in any such court, the record of which has been or may be lost or destroyed, may be filed in the court to which it appertains, and shall have the same force and effect as if it were an original report, return, paper, or other document made to or filed in such court; and in any case in which the names of the parties and the date and amount of judgment or decree shall appear from such return, paper, or document, it shall be lawful for the court in which they are filed to issue the proper process to enforce such decree or judgment, in the same manner as if the original record remained in said court. And in all cases where any of the files, papers, or records of any court of the United States have been or shall be lost or destroyed, the files, records, and papers which, pursuant to law, may have been or may be restored or supplied in place of such records, files, and papers, shall have the same force and effect, to all intents and purposes, as the originals thereof would have been entitled to. [Amended to read as above by act of January 31, 1879, ch. 39, 20 Stat. L. 277.]

§ 904. *Same subject.*

That whenever any of the records or files in which the United States are interested of any court of the United States have been or may be lost or destroyed, it shall be the duty of the attorney of the United States for the district or court to which such files and records belong, so far as the judges of such courts respectively shall deem it essential to the interests of the United States that such records and files to [*sic*] be restored or supplied, to take such steps, under the direction of said judges, as may be necessary to effect such restoration or substitution, including such dockets, indices, and other books and papers as said judges shall think proper. Said judges may direct the performance, by the clerks of said courts respectively and by the United States attorneys, of any duties incident thereto; and said clerks and attorneys shall be allowed such compensation for services in the matter and for lawful disbursements as may be approved by the Attorney-General of the United States, upon a certificate by the judges of said courts stating that such claim for services and disbursements is just and reasonable; and the sum so allowed shall be paid out of the judiciary fund. [Amended to read as above by act of January 31, 1879, ch. 39, 20 Stat. L. 277.]

TORRENS LAND ACT.

CHAPTER 110.

An act for the certification of land titles and the simplification of the transfer of real estate.

[Approved March 17, 1897.]

The people of the State of California, represented in senate and assembly, do enact as follows:

COUNTY RECORDERS EX OFFICIO REGISTRARS.

Section 1. Recorders to be registrars.

SECTION 1. Recorders and ex officio recorders in the several counties of this State shall be registrars of titles in their respective counties, and their deputies shall be deputy registrars. All laws relative to recorders and their deputies, including their compensation, clerk hire, and expenses, shall extend to registrars and their deputies, so far as the same may be applicable, except as in this act otherwise provided. Registrars of titles shall be county officers within the meaning of the laws of this State.

Section 2. Bonds of recorders to cover their duties as registrars.

SEC. 2. The official bonds now required by law to be given by recorders and ex officio recorders before entering upon the discharge of their duties, shall also apply to and cover the faithful discharge of their duties as registrars, whether such additional condition be specifically provided for in such bonds or not.

Section 3. Deputies may act.

SEC. 3. Deputies may perform any and all duties of the registrar, in the name of the registrar, and the acts of such deputies shall be held to be the acts of the registrar.

Section 4. Registrar and deputy not to practice law.

SEC. 4. Registrars and deputy registrars are prohibited from practicing law, or acting as attorneys or counselors at law, or having as a partner a lawyer or any one who acts as such, or from acting as searchers of title under this act.

BRINGING LAND UNDER THE ACT.

Section 5. Application by verified petition; character of applicant; county of application.

SEC. 5. Land may be brought under the operation of this act by the filing with the county clerk of a verified petition to the superior court of the county within which such land is situated, by the owner of any estate or interest in such land, whether legal or equitable (other

than an undivided share, or an easement). The clerk shall immediately indorse on such application the exact time of its presentation, and enter the same in a book kept for that purpose and known as the Land Register Docket. Persons who collectively claim to hold the entire legal estate in fee simple may jointly file such petition. A corporation may apply by its authorized agent, an infant by his guardian; any other person under disability by his guardian or trustee. Land constituting a single parcel and lying partly in two or more counties may be included in one application, which may be made in either county in which the land lies, but the certificate issued therefor must be filed with the registrars of all the counties within which such land is situate. Two or more parcels of land may be included in one application if owned by the same person and in the same right.

Section 6. Contents of application.

SEC. 6. The petition shall set forth substantially:

(*a*) The name, occupation, place of residence, and post-office address of the applicant, and if the application is by one acting in behalf of another, the name, place of residence, post-office address, and capacity of the person so acting, and the nature of the disability of the person for whom he is acting.

(*b*) Whether the applicant (except in case of a corporation) is married or not, and, if married, the name and residence of the husband or wife.

(*c*) The description of the land.

(*d*) The applicant's estate or interest in the same, and whether the same is subject to an estate of homestead.

(*e*) Whether the land is occupied or unoccupied, and, if occupied, the name and post-office address of each occupant, and what estate or interest he has or claims in the land.

(*f*) Whether the land is subject to any easement, lien, or incumbrance, and, if any, the name and post-office address if known of each holder thereof, and the nature and amount of the same, and, if recorded, the book and page of the record.

(*g*) Whether any other person has any estate or claims any interest in the land, in law or equity, in possession, remainder, reversion, or expectancy, and, if any, the name and post-office address if known of every such person, and the nature of his estate or claim.

(*h*) The names and post-office addresses of all the owners of the adjoining lands, so far as he is able, upon diligent inquiry, to ascertain the same.

(*i*) If the applicant is a male, that he is of the full age of twenty-one years; if a female, that she is of the full age of eighteen years. If the application is made by a corporation, its name, when and where incorporated, its principal place of business, and the names and post-office addresses of its president and secretary. If the application is by a husband or wife, and the property is community property, the petition must so state, and both spouses must join therein. A plat or plan of survey of the land made by the county or a licensed surveyor must accompany the application, and if said land is a part of a city, town, or subdivision, the application must refer to the book and page

of the records of the county where the map of said city, town, or subdivision is recorded, if at all.

Each application must be accompanied by an abstract of the title, verified by the searcher making the same, as required in proceedings in partition, or, if made by a corporation engaged in the business of making and certifying abstracts of title, then in lieu of the affidavit a certificate by such corporation, under its seal, shall be sufficient. When the title to the land in question has been previously determined by a final decree of a court of competent jurisdiction, such abstracts need not antedate such decree unless required by the court in which such application is filed. No person or corporation shall be authorized to make or furnish such abstracts of title until after entering into an undertaking with two or more sufficient sureties to the people of the State of California in a sum not less than ten thousand dollars, which may be increased from time to time by order of the court. Such bonds shall be recorded in the record of official bonds in the recorder's office of the county and then filed in the county clerk's office. Said bond shall be conditioned to pay all damages and costs which the State may sustain by reason of any error or insufficiency in said abstract. The sureties on such bond shall qualify as provided in section ten hundred and fifty-seven of the Code of Civil Procedure, and the sufficiency of the bond and of the sureties thereon shall be approved by a judge of the superior court of the county where such bond is to be filed. The sureties upon such bond may become severally liable in portions of not less than five hundred dollars each, making in the aggregate at least two sureties for the whole sum. Said bond shall be renewed as often, at least, as once in every period of three years.

Section 7. Registration of fee simple must precede all else.

SEC. 7. No mortgage, lien, charge, or lesser estate than a fee simple shall be registered unless the fee simple to the same land is first registered.

Section 8. Registration not to be refused because of incumbrance.

SEC. 8. It shall not be an objection to bringing land under this act, that the estate or interest of the applicant is subject to any outstanding lesser estate, mortgage, lien, or charge; but every such lesser estate, mortgage, lien, or charge shall be noted upon the certificate of title and the duplicate thereof, and the title or interest certified shall be subject only to such estates, mortgages, liens, and charges as are so noted, except as herein provided.

Section 9. No registration based on tax title until after five years adverse possession.

SEC. 9. No title derived through sale for any tax or assessment shall be entitled to be first registered, unless it shall appear to the satisfaction of the court, upon the hearing of the application, that the applicant, or those through whom he claims title, have been in the open, actual, continuous, uninterrupted, undisputed, exclusive, and adverse possession of the land under such title at least five years, and have paid all taxes and assessments legally levied thereon for five successive years.

Section 20. Applicant may withdraw application upon payment of fees at any time prior to issuance of certificate of title.

SEC. 20. Any applicant may, upon payment of all fees due, withdraw his application for registration at any time prior to the issuing of a certificate of title; and upon the written request of such applicant and the order of the court, the clerk shall return to the applicant all abstracts of title, deeds, and other instruments, except depositions or affidavits deposited by him for the purpose of supporting his application.

Section 21. On transfer of interest or death of applicant, proceedings may be continued.

SEC. 21. In case of the death or any disability of the applicant, the court, on motion, may allow the proceeding to be continued by or against his representative or successor in interest. In case of any other transfer of interest the proceeding may be continued in the name of the original applicant, or the court may allow the person to whom the transfer is made to be substituted in the proceeding.

Section 22. Registrar to keep record of particulars of issuance.

SEC. 22. The registrar shall immediately, upon the registration of any land, make an entry in a book kept by him for that purpose, showing the name of the person to whom the certificate was issued, its number, the day, hour, and minute of its issuance, the name of the person to whom the duplicate certificate was delivered, and the book and page where the original certificate is entered or recorded.

Section 23. Certificate of title to be in duplicate; its contents; original to be retained by registrar.

SEC. 23. Every first and subsequent certificate of title shall be in duplicate and numbered consecutively and bear date the year, month, day, hour, and minute of its issue, and be under the hand and official seal of the registrar, one copy of which shall be retained by the registrar and be known as the original, and the other shall be delivered to the owner, or person acting for him, and be known as the duplicate. It shall state whether the owner, except in the case of a corporation, executor, administrator, assignee, or other trustee, is married or not married, and the name of the husband or wife. If the owner is a minor, it shall state his age; if under any other disability, the nature of the disability. If issued to an executor or administrator, the certificate shall show the name of the deceased testator or intestate; if to an assignee in insolvency, the name of the insolvent. The registrar shall note at the end of the certificate, original and duplicate, in such manner as to show and preserve their priorities, the particulars of all estates, mortgages, liens, incumbrances, and charges to which the owner's title is subject.

Section 24. Form of certificate.

SEC. 24. No particular form of certificate of title is required, but the same may be, subject to such changes as the case may require, substantially in the following form:

STATE OF CALIFORNIA, County of ———. } ss.

A. B. (state occupation and residence, giving street and number), State of California (if an administrator, give the name of the deceased; if a minor, give his age; if under other disability, state its nature), married to (name of husband or wife, or if not married so state), is the owner of an estate in fee simple (or as the case may be) in the following land (insert description contained in the decree). Subject, however, to the estates, easements, liens, incumbrances, and charges hereunder noted. (In case of trust, condition, or limitation, say "in trust," or "upon condition," or "with limitation," as the case may be.)

1. Mortgage to C. D. for the sum of $———, dated ———, payable ——— after date, with interest at ——— per cent per ———, interest payable ———.

2. Mechanic's lien in favor of X. Y. for $———, filed ———.

3. Assessment for improvement of ——— Street. Amount $———, due ———.

(Any other incumbrances or charges.)

In witness whereof, I have hereunto set my hand and caused my official seal to be affixed, this ——— day of ———.

———— ————,
Registrar of Titles in and for the County of ———, State of California.

[SEAL.]

Section 25. Tenants in common may receive each a certificate.

SEC. 25. In all cases where two or more persons are entitled as tenants in common to an estate in registered land, such persons may receive one certificate for the entirety, or each may receive a separate certificate for his undivided share.

Section 26. Registered owner may consolidate several or divide up one certificate.

SEC. 26. Upon the application of any registered owner of land held under separate certificates of title, or under one certificate, and delivering up of such certificate or certificates of title, the registrar may issue to such owner a single certificate of title for the whole of such land, or several certificates, each containing a portion of such land, in accordance with such application, and as far as the same may be done consistently with any regulations at the time being in force, respecting the certificates of land that may be included in one certificate of title; and upon issuing any such certificate of title said registrar shall indorse on the last previous certificate of title of such land so delivered up a memorial, setting forth the occasion of such cancellation and referring to the volume and folium of the new certificate or certificates of title so issued.

Section 27. Certificate may be issued by order of court in lieu of lost duplicate; proceedings therefor.

SEC. 27. In the event of a duplicate certificate of title being lost, mislaid, or destroyed, the owner may apply to the court for an order upon the registrar to issue a certified copy of the original certificate of registration. Upon the hearing of such application, the court may order

such notice to be given to such persons, and for such time as it may deem proper. If the court is satisfied that the applicant is the person named in the original certificate on file in the registrar's office, and that the duplicate certificate has been lost, mislaid, or destroyed, the court shall make an order directing the registrar to issue a certified copy of the original certificate to the applicant. A certified copy of such order shall be filed in the registrar's office, who shall thereupon issue to such applicant a certified copy of the original certificate, with the memorials and notations appearing upon the register, and shall note upon the register the fact, cause, and date of such issue, and shall also mark upon such certified copy: "Owner's certified copy, issued in place of lost (mislaid, or destroyed, as the case may be) certificate," and such certified copy shall stand in the place of, and have like effect as, the missing duplicate certificate. In case of a lost certificate, no transfer of the land shall be made until such certified copy is issued by the registrar. A certified copy of the certificate of title may be issued by the registrar for use as evidence, upon the receipt by him of an order therefor made by the court; *provided,* that such certified copy shall have written or stamped across the face thereof the words "for use as evidence only." The issuance of such certified copy and the purpose thereof shall also be noted upon the original certificate by the registrar.

Section 28. Change of name or of description to be noted on order of court.

SEC. 28. If an owner's name or description is incorrectly registered, or becomes changed (*e. g.* by marriage, adoption, divorce, etc.), the court, upon the filing of an application and proof of facts in the manner set forth in section twenty-seven of this act, and the production by the owner of the duplicate certificate, shall order the registrar to issue a new certificate, with such changes as the case may require.

THE REGISTER OF TITLES.

Section 29. Original certificate to be entered in register; memorials to be on latest certificate.

SEC. 29. The registrar shall keep a book, to be known as the "Register of Titles," wherein he shall enter all original certificates of title, in the order of their numbers, with appropriate blanks for the entry of memorials and notations allowed by this act. Each certificate, with such blanks, shall constitute a separate folium of such book. All memorials and notations that may be entered upon the register under the terms of this act shall be entered upon the folium constituted by the last certificate of title of the land to which they relate. Each certificate of title shall be numbered the same as the folium of the register on which the registration of the title of which it is a duplicate, is entered.

Section 30. Receipt to be given for duplicate certificate on its issuance.

SEC. 30. Before the delivery of any duplicate certificate of title, a receipt for it shall be required, to be signed by the owner. Where such receipt is signed in the presence of the registrar or a deputy, it shall be witnessed by such officer. If signed elsewhere, it shall be acknowledged before any officer authorized to take acknowledgments of deeds.

Section 31. First registration deemed complete on notation of original entries upon certificates.

SEC. 31. In every case of first registration of land or an estate or interest therein, the same shall be deemed to be registered under this act, when the registrar shall have marked upon the certificate of title, in duplicate, the volume and folium of the register in which the original may be found.

Section 32. Transfer complete on notation upon new certificate; other dealings complete on notation; registration to relate back to filing with registrar.

SEC. 32. Every transfer of registered land shall be deemed to be registered under this act, when the new certificate to the transferee shall have been marked, as in the case of the first registration; and all other dealings shall be considered as registered when the memorial or notation shall have been entered in the register upon the folium constituted by the existing certificate of title of the land. But, for the protection of the transferee or person claiming through any transfer or dealing, the registration shall relate back to the time of filing in the registrar's office the deed, instrument, or notice, pursuant to which the transfer memorial or notation is made.

Section 33. Party aggrieved may bring action against registrar and others.

SEC. 33. Any person feeling himself aggrieved by the action of the registrar, or by his refusal to act in any matter pertaining to the first registration of land, or any subsequent transfer, or charge upon the same, or failing, or neglecting, or refusing to file any instrument, or to enter or cancel any memorial or notation, or to do any other thing required of him by this act, may file a complaint in the superior court making the registrar and other persons, whose interests may be affected, parties defendant, and the court may proceed therein as in other cases, and make such order or decree as shall be according to equity and the purport of this act. A certified copy of such order or decree shall be presented to the registrar, who shall file the same and make such entry thereof as by this act required.

EFFECT OF REGISTRATION.

Section 34. In absence of fraud, title to be subject only to noted incumbrances; exceptions.

SEC. 34. The registered owner of any estate or interest in land brought under this act shall, except in case of fraud to which he is a party, or of the person through whom he claims without valuable consideration paid in good faith, hold the same subject only to such estates, mortgages, liens, charges, and interests as may be noted in the last certificate of title in the registrar's office, and free from all others, except:

1. Any subsisting lease or agreement for a lease for a period not exceeding one year, where there is actual occupation of the land under lease. The term "lease" shall include a verbal letting.

2. All public highways embraced in the description of the lands included in the certificate.

3. Any subsisting right of way or other easement, however created, upon, over, or in respect of the land.

4. Any tax or special assessment for which a sale of the land has not been had at the date of the certificate of title.

5. Such right of action or claim as is allowed by this act.

6. Liens, claims, or rights arising under the laws of the United States, which the statutes of California can not require to appear of record upon the register.

Section 35. No adverse possession after registration possible.

SEC. 35. After land has been registered no title thereto adverse or in derogation to the title of the registered owner shall be acquired by any length of possession.

Section 36. Presumption of good faith in purchaser of registered land.

SEC. 36. Except in case of fraud, and except as herein otherwise provided, no person taking a transfer of registered land, or any estate or interest therein, or of any charge upon the same, from the registered owner, shall be held to inquire into the circumstances under which, or the consideration for which, such owner or any previous registered owner was registered, or be affected with notice, actual or constructive, of any unregistered trust, lien, claim, demand, or interest; and the knowledge that any unregistered trust, lien, claim, demand, or interest is in existence shall not of itself be imputed as fraud.

Section 37. Persons defrauded shall not lose rights.

SEC. 37. In case of fraud, any person defrauded shall have all rights and remedies that he would have had if the land were not under the provisions of this act; *provided,* that nothing contained in this section shall affect the title of a registered owner who has taken bona fide for a valuable consideration, or of any person bona fide claiming through or under him.

Section 38. Registration of forged instrument void, but title of bona fide owner not affected.

SEC. 38. If a deed or other instrument is registered, which is forged, or executed by a person under legal disability, such registration shall be void; *provided,* that the title of a registered owner, who has taken bona fide for a valuable consideration, shall not be affected by reason of his claiming title through some one, the registration of whose right or interest was void, as provided in this section.

Section 39. No unregistered interest shall prevail against bona fide registered owner.

SEC. 39. No unregistered estate, interest, power, right, claim, contract, or trust shall prevail against the title of a registered owner taking bona fide for valuable consideration, or of any person bona fide claiming through or under him.

Section 40. In absence of fraud, certificate of title is conclusive evidence in suit for specific performance of contract to purchase.

SEC. 40. In any suit for specific performance brought by a registered owner of any land under the provisions of this act against a person who may have contracted to purchase such land, not having notice of any fraud or other circumstances which, according to the provisions of this act, would affect the right of the vendor, the certificate of title of such registered owner shall be held in every court to be conclusive evidence that such registered owner has a good and valid title to the land, and for the estate or interest therein mentioned or described.

Section 41. In ejectment or partition suits, certificate is conclusive evidence.

SEC. 41. In any action or proceeding brought for ejectment, partition, or possession of land, the certificate of title of a registered owner shall be held in every court to be conclusive evidence, except as herein otherwise provided, that such registered owner has a good and valid title to the land, and for the estate or interest therein mentioned or described, and that such registered owner is entitled to the possession of said land.

Section 42. The register to be received as evidence.

SEC. 42. The register of any land, and duly certified copies thereof, shall, except as herein otherwise provided, be received in law and in equity as evidence of the facts therein stated, and as conclusive evidence that the person named therein as owner is entitled to the land for the estate or interests therein specified.

Section 43. Memorial to be noted until cancellation.

SEC. 43. Whenever a memorial has been entered, as permitted by this act, the registrar shall carry the same forward upon all certificates of title until the same is canceled in some manner authorized by this act.

Section 44. Dealings subsequent to first registration subject to act.

SEC. 44. All dealings with land, or any estate or interest therein, after the same has been brought under this act, and all liens, incumbrances, and charges upon the same subsequent to the first registration thereof, shall be deemed to be subject to the terms of this act, and to such amendments and alterations as may hereafter be made. The bringing of land under this act shall imply an agreement which shall run with the land, that the same shall be subject to the terms and provisions of the act and of amendments and alterations thereof.

Section 45. Five years' limitation to bringing of action affecting registered land; incompetents to appear.

SEC. 45. No person shall commence any action at law or in equity for the recovery of land, or assert any interest, right in, or lien or demand upon the same, or make entry thereon adversely to the title or interest certified in the first certificate bringing the land under the operation of this act, unless within five years after the first registration. It shall not be an exception to this rule that the person entitled to bring

served on such person at such address. The address may be changed from time to time by such person filing with the registrar a written notice of such change.

Section 55. Instrument affecting registered land to be but a contract until registered.

SEC. 55. A deed, mortgage, lease, or other instrument purporting to convey, transfer, mortgage, lease, charge, or otherwise deal with registered land, or any estate or interest therein, or charge upon the same, other than a will or a lease not exceeding one year where the land is in the actual possession of the lessee or his assigns, shall take effect only by way of contract between the parties thereto, and as authority to the registrar to register the transfer, mortgage, lease, charge, or other dealing upon compliance with the terms of this act. On the filing of such instrument, the land, estate, interest, or charge shall become transferred, mortgaged, leased, charged, or dealt with according to the purport and terms of the deed, mortgage, lease, or other instrument. The registrar shall immediately, upon the filing of such instrument, stamp or write upon the original and duplicate certificates of title the word "transferred," "mortgaged," "leased," or otherwise, as the case may require, with the date of filing such instrument.

Section 56. Certificate before re-transfer, etc., must show freedom from tax sale and homestead.

SEC. 56. No transfer of title to land, or any estate or interest therein, or mortgage, shall be registered, if the last original certificate shows that the land has been sold for any tax or assessment upon which a deed has been given, and that the title is outstanding, or upon which a deed may thereafter be given, or if said certificate shows that the estate of homestead, if any, has not been released or extinguished, unless the transfer or mortgage is intended to be subject to such tax sale or homestead estate, in which case it shall be so stated in the certificate of title.

Section 57. Certificate to state marriage or representative capacity, if any.

SEC. 57. Every certificate of title to land shall state whether the transferee (except when the latter is a corporation, executor, administrator, or assignee) is married or not married, and if married, the name of the husband or wife. If the transferee be an executor or administrator, the certificate shall give the name of the deceased testator or intestate, and if the transferee be an assignee, the name of the insolvent. The transferee shall furnish the registrar the necessary information before he shall be entitled to have the land transferred to him on the register.

MORTGAGES, LEASES, AND OTHER CHARGES.

Section 58. Incumbrance on registered land must be registered.

SEC. 58. Every mortgage, lease, contract to sell, or other instrument intended to create a lien, incumbrance, or charge upon registered land, or any interest therein, shall be deemed to be a charge thereon, and must be registered as hereinafter provided.

Section 59. Incumbrance created on filing of charge.

SEC. 59. On the filing of the instrument intended to create the charge in the registrar's office, and the production of the duplicate certificate of title, and it appearing from the original certificate of title that the person intending to create the charge has the title and right to create such charge, and the person in whose favor the same is sought to be created being entitled by the terms of this act to have the same registered, the registrar shall enter upon the proper folium of the register, and also upon the duplicate certificate, a memorial of the purport thereof, and the date of filing the instrument, with a reference thereto, by its file number, which memorial shall be signed by the registrar. The registrar shall also note upon the instrument on file the volume and folium of the register where the memorial is entered.

Section 60. Trust deed to be treated as a mortgage.

SEC. 60. A trust deed in the nature of a mortgage shall be deemed to be a mortgage, and be subject to the same rules as a mortgage.

Section 61. If instrument charging land be in duplicate or more parts, but one need be filed.

SEC. 61. When any mortgage, lease, or other instrument creating or dealing with a charge upon registered land, or any estate or interest therein, is in duplicate, triplicate, or more parts, only one of the parts need be filed and kept in the registrar's office; but the registrar shall note upon the register whether the same is in duplicate, triplicate, or as the case may be, and shall also mark upon the others "mortgagee's duplicate," "lessor's duplicate," "lessee's duplicate," or as the case may be, and note upon the same the date of filing and the volume and folium of the register where the memorial is entered, and deliver them to the parties entitled thereto.

Section 62. Certified copies identified as such may be issued.

SEC. 62. When an instrument is not executed in a sufficient number of parts for the convenience of the parties, the registrar may make and deliver to each of the parties entitled thereto certified copies of the instrument filed in his office, with the indorsements thereon, marking the same "mortgagee's certified copy," "lessor's certified copy," or as the case may be, and shall note upon the register the fact of issuing such copies. Such certified copies shall have the same force and effect and be treated as duplicates.

Section 63. Assignment of charge by filing and noting of same by memorial.

SEC. 63. The holder of any charge upon registered land, desiring to transfer the same or any part thereof, may execute an assignment of the whole or any part thereof. The assignment of a part only must state whether the part transferred is to be given priority, to be deferred, or to rank equally, with the remaining part. Upon such assignment being filed in the office of the registrar, and the production of the duplicate or certified copy of the instrument creating the charge held by the assignor, the registrar shall enter in the register opposite the charge, a memorial of such transfer, and how it ranks, with a reference

to the assignment by its file number; he shall also note upon the instrument on file in his office intended to be transferred, and upon the duplicate or certified copy thereof produced, the volume and folium where the memorial is entered, with the date of the entry. The transferee shall be entitled to have a certified copy of the instrument of transfer, with the indorsement thereon, and in case of the transfer of the entire charge, the duplicate or certified copy of the instrument creating the charge.

Section 64. Release of part or whole of charge to be noted as an assignment.

SEC. 64. A release, discharge, or surrender of a charge, or any part thereof, or of any part of the land charged, may be effected in the same way as above provided in the case of a transfer. In case only a part of the charge or of the land is intended to be released, discharged, or surrendered, the entry shall be made accordingly; but when the whole is released, discharged, or surrendered at the same or several times, the registrar shall stamp across the instrument on file, and the memorial thereof, and the duplicate or certified copy produced, the word "canceled."

Section 65. Charges to be enforced as at present, except as herein provided and except that notice of lis pendens must be filed with registrar.

SEC. 65. All charges upon registered land, or any estate or interest in the same, may be enforced as now or hereafter allowed by law, and all laws with reference to the foreclosure and release or satisfaction of mortgages shall apply to mortgages upon registered land, or any estate or interest therein, except as herein otherwise provided, and except that until notice of the pendency of any suit to enforce or foreclose such charge is filed in the registrar's office, and a memorial thereof entered on the register, the pendency of such suit shall not be notice to the registrar, or any person dealing with the land or any charge thereon.

ATTORNEYS IN FACT.

Section 66. Attorney in fact to deal with registered land must file his power.

SEC. 66. Before any person can convey, charge, or otherwise deal with registered land, or any estate or interest therein, as attorney in fact for another, the deed or instrument empowering him so to act shall be filed with the registrar, and a memorial thereof entered upon the original and duplicate certificates. If the attorney shall so desire, the registrar shall deliver to him a certified copy of the power of attorney, with the indorsements thereon. Revocation of a power may be registered in like manner.

TRUSTS, CONDITIONS, AND LIMITATIONS.

Section 67. Trusts, etc., to be noted without any of the particulars.

SEC. 67. Whenever a deed or other instrument is filed in the registrar's office for the purpose of effecting a transfer of, or charge upon, registered lands, or any estate or interest therein, and it appears

from such instrument that the transfer or charge is to be in trust, or upon any condition or limitation therein expressed, the registrar shall note in the certificate, and the duplicate thereof, or memorial, the words "in trust," or "upon condition," or "with limitations," as the case may be, but no entry shall be made of the particulars of any such trust, conditions, or limitations.

Section 68. Every trustee with express authority shall have power of sale.

SEC. 68. The trustee or transferee in any such instrument named, if the instrument contains the words "with power of sale," shall have power to deal with the land as the owner thereof; and a bona fide purchaser, mortgagee, or lessee is not bound to inquire into or determine whether or not the acts of such trustee are in accordance with the terms and conditions of the trust. When such power is conferred, the registrar shall note upon the certificate and duplicate thereof the words "with power of sale."

Section 69. No trustee, with limitation, shall sell without order of court to sell.

SEC. 69. If, however, such instrument does not contain the words "with power of sale," such trustee shall have no power to sell or otherwise deal with the land without an order of court so to do, duly given and made, a certified copy of which said order shall be filed with the registrar, and a memorial thereof entered upon the certificate of title, which shall be conclusive evidence as against all persons that the authority of such trustee was duly executed in accordance with the true intent and meaning of the trust, condition, or limitation.

Section 70. Trustee under will shall have power to sell, unless it be withheld.

SEC. 70. A trustee under any will admitted to probate, unless such power shall have been expressly withheld by the terms of such will, shall have power to deal with any registered land held by him in trust as fully in every respect as if such lands belonged to him individually.

ESTATES IN PROBATE, IN INSOLVENCY, AND IN EQUITY PROCEEDINGS.

Section 71. Existing statutes governing probate, insolvency, and equity proceedings not affected.

SEC. 71. The distribution, transfer, leasing, mortgaging, or other change in the status of the title of registered land that is within the jurisdiction of any court by reason of the pendency of probate, insolvency, or equity proceedings, shall be made under the same conditions and limitations as now or hereafter provided by the law of this State.

Section 72. Orders of sale, decrees of distribution, etc., to contain direction to registrar.

SEC. 72. The court in its order or decree making such distribution, transfer, leasing, mortgaging, or other change in the status of the title of registered land, shall direct the registrar to issue a certificate of title,

or to note a memorial of the transaction, as the case may require, in accordance with such order or decree.

Section 73. Certified copy of order, decree, deed, and confirmation to be filed with registrar.

SEC. 73. The executor, administrator, assignee, receiver, or other person acting under the direction of said court, shall file with the registrar a certified copy of such order or decree, also the deed, lease, mortgage, or other instrument executed in accordance with such order or decree, and also a certified copy of the order or decree confirming such sale, lease, mortgage, or other transaction, when such confirmation is required by law.

Section 74. Order of court necessary for sale of land of insolvent and probate estates; confirmation and issuance of certificates thereof.

SEC. 74. Executors, administrators, and assignees in insolvency shall have no power of sale of lands registered in their names as such, without an order of court obtained for that purpose. Before any certificate can be issued to the purchaser, such sales shall be reported for confirmation to the court under whose authority such executor, administrator, or assignee is acting, and if confirmed a duly certified copy of the order of confirmation shall be filed in the office of the registrar, and a memorial thereof entered upon the certificate of title. Upon the filing of the certified copy of such order of confirmation and the entry of such memorial, the registrar shall issue a certificate to the purchaser at such sale, which certificate, in addition to the usual contents thereof, shall refer to the said order of confirmation. Such order of confirmation shall be conclusive evidence that the sale was in all respects conducted in accordance with law, and the purchaser shall not be bound to inquire into the regularity of the proceeding, or power of the executor or administrator to make such sale.

Section 75. Power of sale of executor to be noted.

SEC. 75. If a testator, by his will, has provided that the executor thereof shall have a power of sale of real estate, the court shall direct the registrar to register the words "with power of sale," in respect of the land of the deceased, and such executor shall have power to sell such land without an order of court so to do, but such sales must be confirmed by the court in the manner now or hereafter provided by the law of this State, and a duly certified copy of the order of such confirmation shall be filed with the registrar before any certificate of title can be issued to the purchaser of such land.

Section 76. Registrar to issue certificate or note memorial; such to be conclusive.

SEC. 76. Thereupon the registrar shall issue the certificate of title, or note the memorial, as the case may require; and such certificate of title or memorial noted shall be conclusive evidence in favor of all persons thereafter dealing with said land.

TAX SALES.

Section 77. Notice of purchase to be filed and mailed.

SEC. 77. A purchaser of registered land sold for any tax or assessment, shall, within one day after such purchase, file in the office of the registrar a written notice of such purchase. And thereupon the registrar shall enter a memorial thereof upon the certificate of title, and shall mail to each person named in the certificate, or in the memorials thereon, a copy of said notice, a sufficient number of said copies to be furnished to the registrar by said purchaser at the time of filing said notice. In case the State or a municipal corporation becomes the purchaser of land sold for any tax or assessment, the tax collector shall, within one day thereafter, file with the registrar a notice to that effect. And thereupon the registrar shall enter a memorial thereof upon the register, and shall mail notices to interested parties, as in the case of an individual purchaser. Unless such notice is given as herein provided, the land shall be forever released from the effect of such sale, and no deed shall be issued in pursuance thereof.

Section 78. Tax deed already issued must be registered.

SEC. 78. A tax deed of registered land, or of any estate or interest therein, issued in pursuance of any sale for a tax or assessment made after the taking effect of this act, may be presented by the holder thereof to the registrar, who shall thereupon enter upon the register a memorial of such deed; but such deed, unless the same shall have been issued to the State, shall have only the effect of an agreement for the transfer of the title, and before any certificate of title shall be issued for the land described in such deed, the holder thereof must file with the clerk of the superior court an application for a decree showing the title to said land to be vested in him.

Section 79. Interested persons must be made parties to said application.

SEC. 79. All persons appearing upon the register to be interested in said land, and also the person who appears by the tax collector's books to have paid the tax or assessment last paid before the sale on which the deed is issued, shall be notified; and any person claiming an interest in the land may, upon the hearing of such application, show, as cause why a certificate of title should not issue to the holder of said deed, any fact that might be shown in law or in equity on his behalf to set aside such tax deed, and the applicant shall be required to show affirmatively that all the requirements of the statute to entitle him to a deed have been complied with.

Section 80. Decree shall be given showing condition of title.

SEC. 80. Such application shall be heard by the court, which shall render a decree showing the condition of the title to such land, and who is the owner thereof, and upon presentation to him, of a duly certified copy of such decree, the registrar shall issue a certificate for said land in accordance with the terms and conditions of said decree.

Section 81. Tax deed to State conclusive.

SEC. 81. In case a tax deed of registered land is issued to the State or any municipal corporation, in pursuance of any sale for a tax or assessment made after the taking effect of this act, the registrar shall, upon the filing of such deed in his office, cancel the certificate for the land in said deed described, and issue a new certificate to the State therefor.

Section 82. Notice to be personal or by mail and publication.

SEC. 82. The notice required in section eighty shall be given upon all persons residing in the State by personal service, and upon all persons living out of the State by mail and by publication in the manner now or hereafter required by the laws of this State in an action to quiet title. If such personal service be made by a sheriff or constable, his certificate, and if by any other person, his affidavit, shall be sufficient proof thereof. In case the place of residence of any person is not known to the registrar or the holder of such deed, notice shall be given by publication in a newspaper of general circulation in the county in which the land is situated, at least once a week for four consecutive weeks. Proof of such publication must be made in the manner now or hereafter required by the laws of this State.

Section 83. On redemption, memorial to be canceled.

SEC. 83. Upon presentation to him of a certificate of redemption from any tax sale, the registrar shall cancel the memorial of said sale upon the certificate of title.

PARTITION AND JUDICIAL SALES.

Section 84. All parties noted on register must be parties.

SEC. 84. In proceedings for partition of registered land, proof must be made that all persons, shown by the register of title to be interested in the land, have been made parties to such proceeding.

Section 85. Decree must be filed before certificate issued.

SEC. 85. On confirmation of the report of the commissioners setting off registered lands in proceedings for partition, it shall be the duty of the parties to whom the lands are allotted, to cause a certified copy of the judgment or decree to be filed with the registrar. Thereupon the registrar shall transfer the same upon the register, and issue certificates of title to the persons entitled thereto, as shown by said decree.

Section 86. When sale ordered purchaser must file copy of decree.

SEC. 86. Whenever, in proceedings for partition of registered land, the court shall order a sale of such land, and the same is sold under such order, the purchaser shall file with the registrar a certified copy of the order confirming said sale, together with certificate of the officer holding the writ, that the terms of the sale have been complied with. Thereupon, the registrar shall transfer said land upon the register, and issue a certificate of title to the purchaser, therefor.

Section 87. When mortgage on undivided share, lien attaches only to lands set off to mortgagor.

SEC. 87. When a tenant in common has given any mortgage, or granted any other lien or interest upon his undivided interest, and the same is set off in severalty in proceedings for partition, such mortgage, lien, or other interest shall attach only to the lands so set off, and the registrar shall note the same upon a new register of title, and a new certificate of title, and shall indorse a memorandum of the partition upon the instrument creating such lien, mortgage, or other interest, if the same be on file in his office, before a new certificate of title shall be issued therefor.

Section 88. Purchaser at judicial sale must file certified copy of order confirming sale.

SEC. 88. Whenever registered land shall be sold to satisfy any judgment, decree, or order of court, the purchaser shall file with the registrar a duly certified copy of the order of sale, or of the order confirming such sale, when the same needs to be confirmed by the court, and also the certificate, if any, of the officer, that the terms of sale have been complied with, and thereupon the registrar shall transfer the land to him, and issue a new certificate of title therefor to said purchaser.

LIS PENDENS; NOTICE OF ACTION.

Section 89. Notice to affect registered land must be filed with registrar.

SEC. 89. No suit, bill, or proceeding at law or in equity for any purpose whatever, affecting registered land, or any estate, or interest therein, or any charge upon the same, shall be deemed to be *lis pendens* or notice to any person dealing with the same until notice of the pendency of such suit, bill, or proceeding shall be filed with the registrar and a memorial thereof entered by him upon the register of the last certificate of the title to be affected; *provided, however*, this section shall not apply to attachment proceedings when the officer making the levy shall file his certificate as hereinafter provided.

Section 90. When suit, etc., dismissed, certificate of dismissal or release must be filed with registrar.

SEC. 90. When any suit, bill, or proceeding affecting registered lands has been dismissed or otherwise disposed of, or any judgment, decree, or order has been satisfied, released, reversed, or modified, or any levy of execution, attachment, or other process has been released, discharged, or otherwise disposed of, it shall be the duty of the sheriff, or the clerk of the court in which such proceedings were pending, or had, as the case may be, forthwith, under his hand, and, if the clerk, under the seal of the court, to certify to and file with the registrar, an instrument showing such discharge or release. Upon the same being filed, the registrar shall enter a memorial of such discharge on the register. The costs of such certificate and memorial shall be taxed as other costs in the case.

LIENS, EXECUTIONS, ATTACHMENTS, ETC.

Section 91. Certified copy of judgment or decree must be filed.

SEC. 91. No judgment, or decree, or order of any court shall be a lien on or in anywise affect registered land, or any estate or interest therein, until a certified copy of such judgment, decree, or order, under the hand and official seal of the clerk of the court in which the same is of record, is filed in the office of the registrar, and a memorial of the same is entered upon the register of the last certificate of the title to be affected.

Section 92. Certificate of levy of attachment, or execution, must be filed.

SEC. 92. Whenever registered land is levied upon by virtue of any writ of attachment, execution, or other process, it shall be the duty of the officer making such levy forthwith to file with the registrar a certificate of the fact of such levy, a memorial of which shall be entered upon the register; and no lien shall arise by reason of such levy until the filing of such certificate and the entry in the register of such memorial, any notice thereof, actual or constructive, to the contrary notwithstanding.

Section 93. Notice of mechanics' liens must be filed.

SEC. 93. Notice of liens under the provisions of the mechanics' lien laws of this State shall be filed in the registrar's office, and a memorial thereof entered by him upon the register, as in the case of other charges, and such liens may be enforced as now or hereafter allowed by law. Until such notice is so filed and registered, no lien shall be deemed to have been created.

Section 94. Notice of assessments for street improvements, sewers, etc., must be filed by clerk.

SEC. 94. When in a city, town, or county, an ordinance, resolution, or order is passed or made, to lay out, establish, alter, widen, grade, regrade, relocate, or construct or repair a street, sidewalk, drain, or sewer, or to make any other public improvement, or to do any work, the whole or a portion of the expense for which assessments may be made upon real estate, if any registered land or any land included in an application for registration then pending is affected by the act or proceeding and liable to such assessment, the clerk of the board passing such ordinance, resolution, or order shall, within five days after the passage of such ordinance, resolution, or order, file in the registrar's office a notice of the passage thereof, and a memorial shall thereupon be noted on the register. In case of the repeal of such ordinance, resolution, or order, the clerk of said board, and in case of the satisfaction of any lien thereunder, the superintendent of streets or other officer required by law to collect and receive such assessments, shall, within five days thereafter, notify the registrar, who shall thereupon cancel such memorial.

Section 95. No notice necessary in case of lien for labor performed for corporation not complying with law.

SEC. 95. No statutory or other lien shall be deemed to affect the title to registered land until after a memorial thereof is entered upon the register, as herein provided, except in cases of liens for labor performed for a corporation, as provided in the act of the Legislature of the State of California, approved March thirty-first, eighteen hundred and ninety-one.

Section 96. Clerk of court may file certificate of dismissal of suit or satisfaction of judgment.

SEC. 96. The certificate of the clerk of the court in which any suit, bill, or proceeding shall have been pending, or any judgment or decree is of record, that such suit, bill, or proceeding has been dismissed or otherwise disposed of, or the judgment, decree, or order has been satisfied, released, reversed, or overruled, or of any sheriff or other officer that the levy of any execution, attachment, or other process certified by him has been released, discharged, or otherwise disposed of, being filed in the registrar's office and noted upon the register, shall be sufficient to authorize the registrar to cancel or otherwise treat the memorial of such suit, bill, proceeding, judgment, decree, or levy, according to the purport of such certificate.

CORRECTIONS OF ERRORS IN CERTIFICATE.

Section 97. No correction of register without order of court.

SEC. 97. After a title has been registered and a certificate issued therefor, or after a memorandum, notation, or memorial has been made on the register of title and has been attested, no correction, alteration, or erasure shall be made therein or thereof, except in the manner herein provided.

Section 98. Registrar may apply to court for correction of errors or mistakes in certificate.

SEC. 98. Whenever it appears to the registrar that there is an error or omission in any certificate or memorial, or that any certificate or memorial has been made, entered, indorsed, issued, or canceled by mistake, he may apply to the court for an order summoning all persons registered as interested in the lands to which such certificate or memorial relates, to appear at an appointed time and place and produce their duplicate certificates and show cause why such omission or mistake should not be corrected, and shall thereupon enter a memorial of such application on the register.

Section 99. If all parties consent, court may order correction of errors or mistakes.

SEC. 99. If at the time and place appointed all such persons appear and consent, the court may order and direct the registrar to correct any such error, omission, or mistake on the register and on any duplicate certificate, and may direct the cancellation of any certificate or memorial entered by mistake.

Section 100. If all parties do not consent, court may hear testimony as to alleged error or mistake.

SEC. 100. If such persons, or any of them, fail to appear, or do not consent, the court may proceed to hear testimony as to such alleged error, omission, or mistake, and if it appear to the satisfaction of the court that an error, omission, or mistake has been made, he shall order and direct the registrar to correct the same and to cancel or modify such certificates or memorials as may be necessary to correct such error or mistake. When such error or mistake has been caused by the fault or neglect of the registrar, the costs of such proceedings shall be paid by the State; if by the fault of any person registered as interested in such land, by such person. A certified copy of the order of court, directing the correction of any error, omission, or mistake in respect to any certificate or memorial, shall be filed in the registrar's office before such correction shall be entered or made.

EMINENT DOMAIN.

Section 101. Right of eminent domain not affected.

SEC. 101. Nothing in this act shall be construed to in anywise affect or modify the exercise of the right of eminent domain. When any suit or proceeding shall have been brought in the exercise of such right for the taking of registered land, or any interest therein, or to test the validity of any such taking, or to ascertain and establish the amount of damage by reason of any such taking, it shall be the duty of both parties to the proceeding to see that a certified copy of the judgment or decree therein is duly filed and a memorial thereof entered upon the register; but in the case of the assessment of damages, no such memorial shall be entered by the registrar until such damages have been paid, in which event the register shall also show the payment of such damages; *provided, however,* that the deposit with the treasurer, as allowed by law, of such damages, shall be deemed a payment thereof, and in such case the treasurer shall forthwith file with the registrar a certificate of such deposit, and thereupon a memorial thereof shall be entered upon the register. Upon the filing of the certified copy of the order or decree of the court and the payment of damages, the registrar shall note on the register of title of the owners whose lands have been appropriated, a description of the land so appropriated, and shall register in the name of the person, corporation, or other body entitled thereto, the title of the land taken, and issue a certificate therefor.

INDICES.

Section 102. Property indices to be kept.

SEC. 102. The registrar shall keep property indices, the pages of which shall be divided into columns, showing, first, the section or subdivision; second, the range or block; third, the township or lot; fourth, any further description necessary to identify the land; fifth, the name of the registered owner; sixth, the volume; and seventh, the page of the register in which the lands are registered.

Section 103. Name indices to be kept.

SEC. 103. He shall also keep name indices, the pages of which shall be divided into columns, showing in alphabetical order, first, the names of all registered owners and all other persons interested in or holding charges upon registered land; second, the nature of the interest; third, a brief description of the land; fourth, the volume; and fifth, the page of the register in which the lands are registered.

MISCELLANEOUS PROVISIONS.

Section 104. Registered lands may be partitioned.

SEC. 104. An owner of an undivided interest in registered lands may bring an action for the partition thereof. A notice of such action shall, at the time of the commencement thereof, be filed with the registrar and a memorial entered by him upon the register. A certified copy of any judgment or decree rendered in pursuance of such action shall be filed with the registrar, who shall thereupon issue new certificates in accordance therewith.

Section 105. Registration of adverse lien not conclusive of regularity of proceedings or instruments by which created.

SEC. 105. Whenever, under the provisions of this act, any interest in, or lien, incumbrance, or charge upon registered land, arises adversely to the registered owner without voluntary action by him, and not in pursuance of a judgment or decree of court, such registration shall not be conclusive of the regularity of any proceedings or instruments by means of which such interest, lien, incumbrance, or charge arose, or the validity of the same, and shall have no greater force and effect than would the recording, in case the land were not registered, of an instrument creating a similar interest, lien, incumbrance, or charge.

Section 106. In case of fraud, rights and remedies the same as if land not under this act.

SEC. 106. In the case of fraud, any person defrauded shall have all rights and remedies that he would have had if the lands were not under the provisions of this act; *provided*, that nothing contained in this section shall affect the title of a registered owner who has taken bona fide for a valuable consideration, or of any person bona fide claiming through or under him.

Section 107. Clerk of court shall notify registrar of appeal.

SEC. 107. In case of an appeal from any proceeding under this act, or from any judgment, order, or ~~decree affecting~~ registered lands, the clerk of the court in which the notice of appeal is filed shall forthwith notify the registrar thereof, and thereupon the registrar shall enter upon the register a memorial of such appeal.

Section 108. All fees collected by registrar to be paid to county treasurer and applied to expenses of administration of this act.

SEC. 108. All fees collected by the registrar under the provisions of this act shall be accounted for, paid, disbursed, and disposed of by him in the same manner that fees collected by him as county recorder

are now or may hereafter be by law accounted for, paid, disbursed, and disposed of. Should there be a surplus in any year, such surplus shall be carried into the general fund, and be subject to appropriation for any purpose. In case such fees shall not amount to the sum required for the administration of this act, the deficiency shall be paid from any funds in the treasury not otherwise appropriated.

Section 109. Board of supervisors shall furnish registrar all necessary books, etc.

SEC. 109. All books, blanks, papers, and all things necessary for the purpose of carrying out the provisions of this act, shall be furnished by the board of supervisors, at the expense of the county.

Section 110. The attorney-general, state controller, and secretary of state to prepare forms.

SEC. 110. The attorney-general, state controller, and secretary of state shall prepare a uniform system of books, blanks, and forms for the use of the public officers required to perform duties under this act, and such forms, and none other, shall be used by such officers.

PENALTIES.

Section 111. Fraudulent procurement of certificate, a felony.

SEC. 111. Whoever fraudulently procures, assists in fraudulently procuring, or is privy to the fraudulent procurement of any certificate of title or other instrument, or of any entry in the register or other book kept in the registrar's office, or of any erasure or alteration in any entry in any said book, or in any instrument authorized by this act, or knowingly defrauds or is privy to defrauding any person by means of a false or fraudulent instrument, certificate, statement, or affidavit affecting registered land, shall be guilty of a felony, and fined not exceeding five thousand dollars, or be imprisoned not exceeding five years nor less than one year, or either, or both, in the discretion of the court.

Section 112. Forgery of seal, signature, or instrument in registrar's office, a felony.

SEC. 112. Whoever (1) forges, or procures to be forged, or assists in forging the seal of the registrar, or the name, signature, or handwriting of any officer of the registry office in cases where such officer is expressly or impliedly authorized to affix his signature; or (2) fraudulently stamps, or procures to be stamped, or assists in stamping any document with any forged seal of said registrar; or (3) forges, or procures to be forged, or assists in forging the name, signature, or handwriting of any person whomsoever to any instrument which is expressly or impliedly authorized to be signed by such person; or (4) uses any document upon which any impression, or part of the impression, of any seal of said registrar has been forged, knowing the same to have been forged, or any document, the signature to which has been forged, knowing the same to have been forged; or (5) swears falsely concerning any matter or procedure made and done in pursuance of this act, shall

be guilty of a felony, and imprisoned not exceeding ten years, nor less than one year, or fined not exceeding five thousand dollars, or both fined and imprisoned, in the discretion of the court.

Section 113. No proceeding or conviction under this act shall affect any remedy at law or in equity.

SEC. 113. No proceeding or conviction for any act hereby declared to be a misdemeanor or a felony shall affect any remedy which any person aggrieved or injured by such act may be entitled to at law or in equity against the person who has committed such act, or against his estate, or against the registrar, or upon his bond.

FEES.

Section 114. Fees same as in similar cases under present laws, except as provided herein.

SEC. 114. *First*—The fees, in respect of applications and proceedings under them prior to registration, shall be the same as in actions in the superior court.

Second—There shall be paid to the registrar:

For issuing a certificate of title, including one duplicate thereof, one dollar and fifty cents.

For each additional duplicate, fifty cents.

For registering each transfer, including the issue and registration of the new certificate, one dollar and fifty cents.

For entry of each memorial on the register, including the indorsement upon the duplicate certificates, one dollar.

For the cancellation of each certificate, memorial, or charge, twenty-five cents.

For each certificate showing condition of register, one dollar and fifty cents.

For filing any instrument, or for a certified copy of the register, or of any instrument or writing on file in his office, the same fees allowed by law to recorders for like services.

CONSTRUCTION.

Section 115. Act to be liberally construed. Construction of similar legislation elsewhere, not adopted.

SEC. 115. This act shall be construed liberally so far as may be necessary for the purpose of effecting its general intent, but does not adopt by implication the construction of any similar legislation of other jurisdictions which this act may to any extent have followed.

Section 116. Act to take effect July 1, 1897.

SEC. 116. This act shall take effect and be in force from and after the first day of July, eighteen hundred and ninety-seven.

Held to be constitutional in the case of *Charlotte Robinson* vs. *Frank H. Kerrigan, Judge of the Superior Court of the City and County of San Francisco*, S. F. No. 4659. Opinion written by Associate Justice Shaw, and concurred in by Associate Justices Sloss, Henshaw, Angellotti, McFarland, and Lorigan.

ILLINOIS AND FEDERAL

BURNT-RECORD ACTS

WITH NOTES OF DECISIONS CONSTRUING ILLINOIS BURNT-RECORD ACTS

Compiled by HON. JOHN F. DAVIS, Code Commissioner, of San Francisco.
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CONTENTS.

ILLINOIS BURNT-RECORD ACTS— PAGE.

ACT TO PROVIDE FOR THE RESTORATION OF COURT RECORDS 3

NOTES OF DECISIONS UNDER ACT - - - - - - - - - 5

ACT TO REMEDY THE EVILS CONSEQUENT UPON DESTRUCTION OF PUBLIC RECORDS - - - - - - - - - - - - 6

NOTES OF DECISIONS UNDER ACT - - - - - - - - - 18

ACT TO PROVIDE FOR THE COPYING OF OLD OR DAMAGED PUBLIC RECORD BOOKS - - - - - - - - - - 26

ACT TO PROVIDE FOR THE RE-RECORDING OF INSTRUMENTS WHERE THE ORIGINAL RECORDS THEREOF HAVE BEEN DESTROYED - - - - - - - - - - - - - - - 27

FEDERAL BURNT-RECORD ACTS - - - - - - - 29

ILLINOIS BURNT-RECORD ACTS.

An Act to provide for the restoration of court records which have been lost or destroyed.

[Approved and in force March 19, 1872. L. 1871-2, p. 650; R. S. 1874, p. 837.]

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That whenever the record of any judgment or decree, or other proceeding, of any judicial court of this State, or any part of the record of any judicial proceeding, shall have been or shall hereafter be lost or destroyed, any party or person interested therein may, on application by petition, in writing, under oath, to such court, and on showing, to the satisfaction of such court, that the same has been lost or destroyed without fault or neglect of the party or person making such application, obtain an order from such court, authorizing such defect to be supplied by a duly certified copy of such original record, where the same can be obtained; which certified copy shall, thereafter, have the same effect as such original record would have had, in all respects.

SEC. 2. That whenever the loss or destruction of any such record or part thereof shall have happened or shall hereafter happen, and such defect can not be supplied, as provided in the next preceding section, any party or person interested therein may make a written application to the court to which such record belonged, verified by affidavit or affidavits, showing the loss or destruction thereof, and that certified copies thereof can not be obtained by the party or person making such application, and the substance of the record so lost or destroyed, and that such loss or destruction occurred without the fault or neglect of the party or person making such application, and that the loss or destruction of such record, unless supplied, will or may result in damage to the party or person making such application; and thereupon said court shall cause said application to be entered of record in said court, and due notice of said application shall be given, as in chancery cases, that said application will be heard by said court. And if, upon such hearing, said court shall be satisfied that the statements contained in said written application are true, said court shall make an order, reciting what was the substance and effect of said lost or destroyed record; which order shall be entered of record in said court, and have the same

effect which said original record would have had if the same had not been lost or destroyed, so far as concerns the party or person making such application, and the persons who shall have been notified, as provided for in this section. The record, in all cases where the proceeding was *in rem*, and no personal service was had, may be supplied upon like notice, as nearly as may be, as in the original proceeding. The court in which the application is pending may, in all cases in which publication is required, direct, by order or orders, to be entered of record, the form of the notice, and designate the newspaper or newspapers in which the same shall be published.

SEC. 3. In case of the destruction by fire or otherwise of the records, or any part thereof, of any county court having probate jurisdiction, the judge of any such court may proceed upon his own motion, or upon application in writing of any party in interest, to restore the records, papers and proceedings of this [his] court relating to the estate of deceased persons, including recorded wills and wills probated or filed for probate in said court; and for the purpose of restoring said record, wills, papers or proceedings, or any part thereof, may cause citations to be issued to any and all parties to be designated by him, and may compel the attendance in court of any and all witnesses whose testimony may be necessary to the establishment of any such record or part thereof, and the production of any and all written or documentary evidence which may be by him deemed necessary in determining the true import and effect of the original record, will, paper or other document belonging to the files of said court; and may make such orders and decrees establishing said original record, will, paper, document or proceeding, or the substance thereof, as to him shall seem just and proper; and such judge may make all such rules and regulations governing the said proceedings for the restoration of the record, will, paper, document, and proceeding pertaining to said court, as in his judgment will best secure the rights and protect the interests of all parties concerned.

SEC. 4. That in all causes which have been removed, or shall hereafter be removed, to the supreme court of this state, a duly certified copy of the record of such cause remaining in the said supreme court may be filed in the court from which said cause was removed, on motion of any party or person or persons claiming to be interested therein; and the copy so filed shall have the same effect as the original record would have had if the same had not been lost or destroyed.

SEC. 5. Whereas, by reason of the recent destruction by fire of the records of the courts of Cook County, a necessity exists for this act to take effect immediately; therefore, this act shall take effect and be in force from and after its passage.

Decisions under Act.

SECTION 1.

Every court of general jurisdiction has inherent power to supply its own lost or defaced records. *Goetz* vs. *Koehler*, 20 Ill. App. 233.

Upon motion to restore to the files a portion of record which has been lost, proof of former existence and present loss of such portion of record is sufficient. Evidence held sufficient. *Goetz* vs. *Koehler*, 20 Ill. App. 223.

Lost summons can be supplied by copy, only by order of court, on notice and proofs. *Long* vs. *Sutter*, 67 Ill. 185.

Recognizance may be supplied like other records when lost. *McElwee* vs. *P.*, 77 Ill. 493.

Seal sufficiently indicated in certified copy by scroll, by word "seal," or by letters "L. S." *Holbrook* vs. *Nichol*, 36 Ill. 161.

On petition to restore records destroyed pending suit, it is sufficient to refile bill as to all defendants who have answered, and to refile answers of all assigning errors in record. Bill need not be refiled, as parties permitted to file supplemental and cross-bill. *Chickering* vs. *Fullerton*, 90 Ill. 520.

Judgment creditor, who is entitled to receive proceeds of judgment, is entitled to restoration of record of judgment. *Russell* vs. *Tillja*, 90 Ill. 327.

Petition need not allege that damage will result from failure to restore such record. Plaintiff can not collect his claim until record is restored. *Russell* vs. *Tillja*, 90 Ill. 327.

Prior to above statute, held that application to restore lost files in case, e. g., affidavits, is addressed to discretion of court. Court must be satisfied of loss of original, and that substitute is true copy. *Troy* vs. *Reilley*, 4 Ill. (3 Scam.) 259.

Prior to passage hereof, equity would not entertain bill to restore record,—remedy by motion at law being complete. *Fisher* vs. *Sievres*, 65 Ill. 99.

Whole record should be substantially restored. Cause should be shown for omission of part. *Vail* vs. *Inglehart*, 69 Ill. 332; *Kehoe* vs. *Rounds*, 69 Ill. 351.

Relief under this act, where records lost, cumulative. Right to prove records by secondary evidence remains. *Beveridge* vs. *Chetlain*, 1 Ill. App. 231.

To surety on bond, who was not notified of proceedings to restore record, record as restored was a nullity. But original record may be proved against him by secondary evidence. *Beveridge* vs. *Chetlain,* 1 Ill. App. 231.

Investigation limited to inquiry, what was substance of record sought to be restored? Record includes pleadings and process. *Vail* vs. *Iglehart,* 69 Ill. 332.

Judgment void on face not restored. Otherwise if merely voidable. *Vail* vs. *Iglehart,* 69 Ill. 332.

Statute does not require that evidence before court shall be preserved in record. *McCabe* vs. *Porter,* 73 Ill. 244.

Evidence held sufficient to authorize restoration of record of foreclosure suit. *Curyea* vs. *Berry,* 84 Ill. 600.

After twenty-three years an order of adoption *nunc pro tunc* will not be entered on oral evidence where it does not appear that any suit was pending or that any papers were ever filed in the case. *Tynan* vs. *Weinhard,* 153 Ill. 598.

SECTION 3.

In proceeding by executor to sell land, order restoring lost certificate of publication without notice is void. *Harris* vs. *Lester,* 80 Ill. 307.

Record of will is admissible in evidence although will appears to be attested by only one witness, where original record destroyed by fire was restored by commission under Act of 1843. It will be presumed that court which admitted will to probate and commissioners acted on sufficient evidence, and because this evidence is not preserved the presumption is not overcome. *Grand Tower Transportation Company* vs. *Gill,* 111 Ill. 541.

An Act to remedy the evils consequent upon the destruction of any public records by fire or otherwise.

[Approved and in force April 9, 1872. L. 1871-2, p. 652; R. S. 1874, p. 838.]

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* Whenever it shall appear that the records, or any material part thereof, of any county in this state, have been destroyed by fire or otherwise, any map, plat, deed, conveyance, contract, mortgage, deed of trust, or other instrument in writing affecting real estate in such county, which has been heretofore recorded, or certified copies of such, may be re-recorded: and in recording the same the recorder shall record the certificate of the previous record, and the date of filing for record appearing in said original certificate so recorded shall be deemed and taken as the date of the record thereof. And

copies of any such record so authorized to be made under this section, duly certified by the recorder of any such county, under his seal of office, shall be received in evidence and have the same force and effect as certified copies of the original record.

SEC. 2. In any county of this state where the records have been burned or destroyed, as specified in the last section, and any map, plat, deed, conveyance, contract, mortgage, deed of trust, or other instrument in writing affecting real estate in such county, has been recorded in any other county of this state, certified copies of the same, heretofore or hereafter made, may be recorded in such county where the records have been so burned or destroyed, and in recording the same the recorder shall record all certificates attached thereto; and if any of such certificates show the previous recording of the same in the county where the records have been burned or destroyed, the date of filing for record in such county appearing in said certificate so recorded shall be deemed and taken as the date of the record thereof. And copies of any such record, so authorized to be made under this section, duly certified by the recorder of any such county, under his seal of office, shall be received in evidence, and have the same force and effect as certified copies of the original record.

SEC. 3. Whenever in any court of record in this state, or any other state, or in any court of the United States, there are original or certified copies of any deed, conveyance, contract, mortgage, deed of trust, or other instrument in writing affecting real estate in such county, copies thereof, certified by the clerk of such court, under his seal of office, may be made and recorded in such county where the records have been so burned or destroyed, and in recording the same the recorder shall record all the certificates attached thereto; and if any of such certificates show the previous recording of the same in the county where the records have been so burned or destroyed, the date of filing for record in such county appearing in said certificate so recorded shall be deemed and taken as the date of the record thereof. Copies of any such record so authorized to be made under this section, duly certified by the recorder of any such county, under his seal of office, shall be received in evidence, and have the same force and effect as certified copies of the original record.

SEC. 4. Whenever the public record of any plat or map, which is required by law to be kept by the recorder of deeds, has been or may hereafter be injured or destroyed by fire or otherwise, it shall be the duty of the state's attorney of the county in which such injury, loss or destruction has occurred or shall occur, forthwith to file in the circuit court an information in the name of the People of the State of Illinois,

setting forth substantially the fact of such injury, loss or destruction, with the circumstances attending the same, as near as may be; and thereupon the clerk of such court shall cause such information to be published in full in one or more public newspapers published in such county, for the period of four weeks, together with a notice addressed to "all whom it may concern," that the court will, at a term therein designated, to be held not less than four weeks from the first publication of such information and notice, proceed to hear and determine the matters in said information set forth, and will take testimony for the purpose of reproducing and re-establishing such records of maps and plats as the court shall find to be injured, lost or destroyed. Upon such publication being made, all persons interested shall be deemed defendants, and may appear in person or by counsel, and be heard touching such proceedings. If the court shall be satisfied that any public record of maps and plats has been injured, lost or destroyed, an order to that effect shall be entered of record, and thereupon the court shall proceed to take testimony for the purpose of reproducing and re-establishing the record so injured, lost or destroyed. The proceedings may be continued from time to time, whether in term or not, and orders and decrees shall be made as to each map or plat separately. The clerk shall cause all maps and plats adjudged by the court to be correct copies of the records injured, lost or destroyed, as often and as soon as they are so adjudged, to be filed in the office of the recorder of deeds, with a certified copy of the order or judgment of the court in the premises attached thereto, and recorded in a book or books to be provided for that purpose. And the said record shall be deemed and taken in all courts and places as a public record, and as a true and correct reproduction of the original record so injured, lost or destroyed.

SEC. 5. All costs and expenses incurred in the proceeding under the last preceding section, including copies of maps and plats and recording of the same, shall be taxed as costs against the county in which such proceedings are had.

SEC. 6. Whenever it shall appear that the records or any material part thereof of any county in this state have been destroyed by fire or otherwise, so that a connected chain of title can not be deduced therefrom, copies duly certified by the proper officers, of all deeds, patents, certificates, plats and legal subdivisions of lands in such county in the custody or control of any officer of this state or the United States, may be recorded in the recorder's office of such county; and the record so made shall have the same force and effect as the record of the originals of such instruments.

SEC. 7. It shall be the duty of the county board of such county, as soon as may be, to procure from the United States authorities at Washington, Springfield or elsewhere, all maps, tract books or official entries or properly authenticated copies thereof as relate to any of the lands in such county, and cause the same to be recorded in the recorder's office of such county.

SEC. 8. It shall be the duty of the judges of the circuit court of the county, or the judges of the circuit and superior courts of Cook County, to examine into the state of the records in such county, and in case they find any abstracts, copies, minutes or extracts from said records existing after such destruction as aforesaid, and find that said abstracts, copies, minutes or extracts were fairly made before the destruction of the records by any person or persons, in the ordinary course of business, and that they contain a material and substantial part of said records, the said circuit judge of the county, or the judges of the circuit or superior courts of Cook County, shall certify the facts found by them in respect to such abstracts, copies, minutes and extracts, and the said judges of said county, or the judges of the circuit or superior courts of Cook County, shall cause all evidence produced as to said abstract books to be reduced to writing, and shall cause all such evidence to be spread of record, as a part of the order of said court. And also (if they are of that opinion), that such abstract, copies, minutes and extracts tend to show a connected chain of title to the land in said county, and upon filing of a certificate of such circuit judge or the judges of the circuit and superior courts of Cook County, with the county clerk of the proper county, the county board may, with the approval of the judge of the circuit court of the county or the judges of the circuit and superior courts of Cook County, purchase from the owners thereof such abstract, copies, minutes or extracts, or such part thereof as may tend to show a connected chain of title to the land in such county, including all such judgments and decrees as form part of any such chain of title, paying therefor such fair and reasonable price as may be agreed upon between them and such owners: the amount thus agreed to be paid for such abstracts, copies, minutes or extracts shall be paid by such county in money or in bonds, to be issued by said county as the county board may determine, or such county board may, with said approval, procure a copy of said extracts, copies, minutes and extracts, instead of the original, to be paid for in like manner: *And it is further provided*, that any owner of said abstracts, copies or minutes shall have the right to file a petition at any regular term of the circuit court of the proper county, in which petition he or they shall set forth the manner in which such abstracts, copies or minutes were made or procured, and if the court shall find from the evidence produced (which evidence shall be preserved as hereinbefore provided) that said abstracts, copies or

minutes were fairly made in the regular course of business before such destruction of the records, the court shall enter his decree to that effect, and the evidence produced on the trial of said cause entered of record at large as a part of the decree of the court. And thereupon said abstracts, copies or minutes of said burnt records shall be taken as *prima facie* evidence of all such matters as they contain (but no such abstracts, copies, minutes or extracts shall be taken or held to be *prima facie* evidence of what they contain that does not purport to recite all deeds and mortgages previously executed and recorded, and describing the several tracts of lands and town lots to which said abstracts, copies, minutes or extracts refer from the date of entry.): *Provided, further,* that all abstracts to separate tracts of lands made by the owner of said abstracts, copies, minutes or extracts shall also be taken and held as *prima facie* evidence of what they contain when they shall be accompanied with an affidavit signed and sworn to by the owner or owners of said abstracts, copies, minutes or extracts, showing that said separate abstracts contain a full, true and perfect copy of all transfers on the tract or tracts set forth in said separate abstracts as appears upon said abstracts, copies, minutes or extracts, as established by the circuit court of ———— county, on the —— day of ————, A. D. ——, and that said separate abstracts contain all deeds, mortgages and other liens on said separate tracts, as shown by said abstracts, copies, minutes or extracts established as aforesaid. [As amended by L. 1887, p. 258, June 15, July 1.]

SEC. 9. Said abstracts, copies, minutes and extracts, or said copy thereof, if so bought as aforesaid, shall thereupon be placed in the recorder's office of such county, to be copied or arranged in such form as the county board shall deem best for the public interest, and in case the originals have been lost or destroyed, or not in the power of the party asking to use the same on any trial or other proceeding, copies of the same or any part thereof, duly certified by the recorder of deeds of such county, shall be admissible as evidence in all the courts of law and equity in this state. And it shall be the duty of the recorder of deeds of such county to furnish to any and all parties requesting it (upon being paid the charges herein provided for), certified copies of the same, or parts thereof; and for the purpose of repaying the cost of the same to the county, the county board may fix a compensation, to be paid to the county, in addition to the fees allowed by law to the recorder for transcribing the same. In all cases in which any abstracts, copies, minutes and extracts, or copies thereof, shall be received in evidence under any of the provisions of this act, all deeds or other instruments of writing appearing thereby to have been executed by any person or persons, or in which they appear to have joined, shall (except as against any person or persons in the actual possession of the

lands or lots described therein at the time of the destruction of the records of such county, claiming title thereto otherwise than under a sale for taxes or special assessments) be presumed to have been executed and acknowledged according to law; and all sales under powers, and all judgments, decrees and legal proceedings and all sales thereunder (sales for taxes and assessments, and judgments and proceedings for the enforcement of taxes and assessments excepted), shall be presumed to be regular and correct, except as against the person or persons in this section before mentioned, and any person alleging any defect or irregularity in any such conveyance, acknowledgment, sale, judgment, decree or legal proceeding shall be held bound to prove the same, and any deed proved under the provisions of this act purporting to be based upon the execution of any power or upon a judgment or decree shall be *prima facie* evidence of the existence of such power, judgment or decree: *Provided*, that nothing in this act contained shall impair the effect of said destroyed record as notice. [As amended by L. 1887, p. 258, June 15, July 1.]

SEC. 10. In case of such destruction of records, as aforesaid, any and all courts in such county having chancery jurisdiction shall have power to inquire into the condition of any title to or interest in any land in such county, and to make all such orders, judgments and decrees as may be necessary to determine and establish said title or interest, legal or equitable, against all persons known or unknown, and all liens existing on such land, whether by statute, judgment, mortgage, deed of trust or otherwise.

SEC. 11. It shall be lawful for any person claiming title to any lands in such county at the time of the destruction of such records, and for all claiming under any such person, to file a petition in any court in such county having chancery jurisdiction, praying for a decree establishing and confirming his said title. Any number of parcels of land may be included in one petition, or separate petitions may be filed as the petitioner may elect. Said petition shall state clearly the description of said lands, the character and extent of the estate claimed by the petitioner, and from whom, and when, and by what mode he derived his title thereto. It shall give the names of all persons owning or claiming any estate in fee in said lands, or any part thereof, and also all persons who shall be in possession of said lands, or any part thereof, and also all persons to whom any such lands shall have been conveyed, and the deed or deeds of such conveyance shall have been recorded in the office of the recorder of deeds of such county, since the time of the destruction of such records as aforesaid, and prior to the time of the filing of such petition, and their residences, so far as the same are known to said petitioner; and if no such persons are known to said

petitioner it shall be so stated in said petition. All persons so named in said petition shall be made defendants, and shall be notified of said suit by summons, if residents of this state, in the same manner as is now or may hereafter be required in chancery proceedings by the laws of this state: *Provided,* that the notice specified in section twelve of this act shall be the only publication notice required, either in case of residents, non-residents or otherwise. All other persons shall be deemed and taken as defendants, by the name or designation of "all whom it may concern." Said petition shall be verified by the affidavit of the petitioner, or by the agent of said petitioner; and the party so swearing falsely shall be deemed guilty of perjury and punished accordingly, and shall be liable in damages to any person injured by such false statement, to be recovered in an action on the case, in any court having jurisdiction thereof.

SEC. 12. It shall be the duty of the clerk of the court in which said petition is filed, to enter, in a separate book or books to be kept for the purpose, the names of the petitioners and defendants, the date of filing said petition, and a description of all the lands included therein, which record shall be at all times open to the public. All lands in each separate town, addition, section or subdivision shall be entered on the same page or consecutive pages, with an index to said book or books, showing on what page any such separate town, addition, section or subdivision may be found. Said clerk shall also, in all cases, cause publication of notice to be made of the filing of said petition, which notice shall be entitled "land title notice," and shall be substantially as follows:

A, B, C, D, etc., (here giving the names of all known defendants, if any,) and to all whom it may concern:

TAKE NOTICE—That on the —— day of ————, A. D. 18—, a petition was filed by the undersigned, in the ———— court of ———— county, to establish his title to the following described lands. (Here insert a full description of the lands in said petition.) Now, unless you appear at the —— term of said court, (naming the first term, after thirty days from the first insertion of said notice), and show cause against said application, said petition shall be taken for confessed, and the title or interest of said petitioner will be decreed and established according to the prayer of said petition, and you forever barred from disputing the same.

G P, Solicitor. E F, Petitioner.

Said notice shall be published once a week for four weeks successively, the first insertion to be at least thirty days prior to said term of court, and the several publications shall all be in the same newspaper in said county, or if there is no newspaper published in said county, then in a

newspaper published in one of the counties nearest thereto. The clerk of the circuit court of such county shall advertise for bids for publishing said notices, (said advertisement to be inserted one week in at least two of the principal newspapers in such county or the adjoining counties, to be selected by the judge or judges of the circuit court in said county), and the publishing of said notices shall thereupon be awarded by said judge or judges to the newspaper making the lowest bid therefor; or if there are two or more making the same bid, then said judge or judges shall determine to which of them said publishing shall be awarded, said award to be by order of said court entered of record therein; and a copy of such order, certified by the clerk of said court under the seal thereof, shall be transmitted to and entered of record in any other court in such county having chancery jurisdiction before which proceedings under this section may be had. All publications provided for in this section shall be made in the newspaper so designated. Said newspaper shall not be changed unless the judge or judges of said court shall, for good cause, in their discretion, decide to change the same; in which case another paper shall be selected in like manner, and the order naming or changing said paper shall be entered of record as aforesaid.

SEC. 13. Any person interested may oppose any such petition, and file his demurrer or answer thereto on or before the third day of the term of court named in said publication notice, unless the time be extended by order of court, and may also file a cross petition if he or she desires to do so. Said answer shall admit, confess and avoid or transverse all the material allegations of the petition, and shall, except when made by guardians *ad litem*, be verified by the affidavit of either the respondent or his agent, in the same manner as above required on cases of the petition. Said answer shall have no other nor greater weight as evidence than the petition.

SEC. 14. If no demurrer or answer shall be filed by the third day of said term, or by the day allowed by the order of said court, as above provided, the petition may be taken for confessed, and a decree entered according to the prayer of said petition, upon proof of the facts stated in said petition; but if any person shall file an answer, as aforesaid, to such petition, the court may hear evidence, or order a reference to a master in chancery or special commissioner, to take evidence and report when the same proceedings shall be had as on a reference to a master in chancery under and according to the practice in courts of chancery in this state. If the petition includes more than one parcel of land, and no demurrer or answers shall be filed as to some of said parcels, the court may enter a decree, *pro confesso*, as to those parcels as to which no demurrer or answer shall be filed, and hear evidence, or order a reference as to the remaining parcels.

SEC. 15. It shall be competent for said courts, in all such decrees, whether *pro confesso*, or on the report of any master or special commissioner, or otherwise, to determine and decree in whom the title in any or all of the lands described in said petition is vested, whether in the petitioner or in any other of the parties before the court; but said decree shall not in anywise affect any lien or liens to which said fee may be subject, and which have been created since the destruction of such records, whether the same be by mortgage, deed of trust, judgment, statute, mechanic's lien or otherwise, but shall leave all such liens to be ascertained or established in some other proceeding, or to be enforced, as the parties holding them may see fit. [As amended by L. 1887, p. 260, June 15, July 1.]

SEC. 16. Said decree of said court, when entered, shall be forever binding and conclusive: *Provided*, that any decree shall be subject to be opened, modified, vacated or set aside on appeal or writ of error sued within two years after the entry of such decree: *And, provided, further*, that insane persons and minors shall have two years after their disabilities are removed to prosecute a writ of error upon said decree: *Provided, further*, that any decree entered upon any petition or cross petition, which does not make defendant, by name, all persons who shall be in possession of such lands or any part thereof, at the time of the filing of such petition, or which does not make defendant, by name, all persons to whom any such lands shall have been conveyed, and the deed or deeds of such conveyance shall have been recorded in the office of the recorder of deeds of such county since the time of the destruction of the records, as aforesaid, and prior to the time of the filing of any such petition, shall be absolutely void as to such person omitted, but shall be final and conclusive as to all others: *And, provided, further*, that all defendants who shall not be actually served with a summons in the suit in which such decree may be rendered, shall have allowed to them one year after the entry of such decree within which, upon petition to the court rendering the same, to have the said decree vacated and set aside in the same manner as is now allowed to defendants under section 19, of chapter 22, of the Revised Statutes, entitled "Chancery." [As amended by L. 1887, p. 261, June 15, July 1.]

SEC. 17. Whenever any deeds or other instruments, in writing, affecting the title to any of the lands in any such county, shall have been filed for record so short a time before such destruction of the records, as aforesaid, that no proof of them remains either on such records, or among the abstracts, copies, minutes or extracts specified in section eight of this act, it shall be the duty of the person or persons having filed the same or claiming the benefit thereof, within sixty days from

the time this act takes effect, to refile for record such deeds or other instruments or copies thereof, or if that can not be done, then he shall, within sixty days, make and file a petition to establish such deed or other instrument of writing, under the provisions of this act. In all cases when any original deed and the record thereof has been lost or destroyed, [it shall be lawful for any person having] a duly certified copy of said record to cause the same to be recorded, which record shall have the same force and effect as now belong to the record of original deeds.

SEC. 18. No tax deed or certificate of tax sale based on any proceedings, the record of which shall appear to have been destroyed as aforesaid, shall be received in any of the courts of this state as *prima facie* evidence of the regularity of such proceedings, but the burden of proof shall be upon the person claiming under such deed or certificate to show the regularity and legality of all such proceedings. In order to sustain the validity of any tax deed or sale for any tax or taxes, assessment or assessments, in any county to which the provisions of this act are applicable, in any suit or proceeding whatsoever, it shall be necessary for the party relying upon any such deed or sale to show, affirmatively, that each and all of the provisions of law, in respect to assessment, levy, sale and deed of the lands affected or to be affected by any such deed or sale as aforesaid, have been in all respects complied with—and no presumption shall be indulged in favor of any such tax-deed or sale; and it shall not be sufficient to show a collector's report, notice, judgment, order of sale, sale notice, notice of sale, tax affidavit, and deed, [anything] in this law or in any other law of this state to the contrary notwithstanding.

SEC. 19. Executors, administrators, conservators, guardians and trustees shall be entitled to proceed under this act in behalf of the interests and rights they represent.

SEC. 20. The judges of courts having chancery jurisdiction in such county shall have power to appoint as many special commissioners from time to time as they may deem necessary to carry out the provisions of this act, in addition to the masters in chancery of said courts, who shall be, *ex officio*, such special commissioners, to take evidence and report all such petitions as may be referred to them. The fees of all masters in chancery, commissioners, clerks, sheriffs and all officers and employees, for services under this act, shall not, in any case, exceed two thirds of the fees now or hereafter provided by law for the same services.

SEC. 21. The word "person," when used in this act, shall include persons and all bodies politic and corporate.

Decisions Under Act.

GENERALLY.

This act is made remedial, and applies to all cases which, by fair construction of its terms, it can be made to reach. *Smith* vs. *Stevens*, 82 Ill. 554.

Constitutionality of this act affirmed. *Bertram* vs. *Taylor*, 86 Ill. 235; *Heacock* vs. *Lubuke*, 107 Ill. 396.

Burnt-Records act not unconstitutional in not providing for jury trial. It is an enlargement and regulation of equitable rights and procedure in equity. *Gormley* vs. *Clark*, 134 U. S. 338.

Decree declaring null an ordinance vacating a plat, enforcing rights according to plat, directing parties to remove obstructions from streets, and in default thereof that marshal remove the same and give possession to petitioner, whose title is established by decree—all without jury trial—*held* authorized hereby. *Gormley* vs. *Clark*, 134 U. S. 338.

Procedure under Burnt-Records act may be administered in Federal courts as well as state courts. *Gormley* vs. *Clark*, 134 U. S. 338.

Burnt-Records act is in effect a statute of limitations. *Gormley* vs. *Clark*, 134 U. S. 338.

The statute does not contravene Constitution of 1870, Article II, Section 5, which provides that trial by jury as heretofore enjoyed shall remain inviolate. *Heacock* vs. *Hosmer*, 109 Ill. 245; *Harding* vs. *Fuller*, 141 Ill. 308 (1892).

SECTION 1.

Destruction of record of conveyance, trust deed or mortgage does not alter effect of record as notice to subsequent purchasers. *Shannon* vs. *Hall*, 72 Ill. 354; same case, 85 Ill. 473; *Gammon* vs. *Hodges*, 73 Ill. 140; *Steele* vs. *Boone*, 75 Ill. 457; *Heaton* vs. *Prather*, 84 Ill. 330; *Curyea* vs. *Berry*, 84 Ill. 600.

Section applied in suit under this to quiet title. *Fitch* vs. *Wetherbee*, 110 Ill. 475.

SECTION 6.

Abbreviations in extracts or minutes will not render the same incompetent, but the same may be explained by parol evidence. *Converse* vs. *Ward*, 142 Ill. 132 (1892).

Extracts or minutes from the destroyed records, or the originals thereof, are admissible in evidence without showing that no ante-fire abstract of title is in existence. *Converse* vs. *Ward*, 142 Ill. 132 (1892).

SECTION 10.

Petition in burnt-record proceeding is to be filed in any court having chancery jurisdiction. *Gage* vs. *Du Puy*, 127 Ill 216.

Two kinds of petition authorized: (1) to establish title; (2) to establish lien. *Mulvey* vs. *Gibbons*, 87 Ill. 367.

Petition should state contents of alleged record substantially, but need not *in haec verba*. Allegations of record of judgment on *cognovit*, *held* sufficient. *Russell* vs. *Lillja*, 90 Ill. 327.

If judgment was on *cognovit*, name of attorney entering *cognovit* need not be alleged. *Russell* vs. *Lillja*, 90 Ill. 327.

Allegations as to record of judgment confessed, showing that court has jurisdiction of *res* and of parties, and gave judgment on confession for given amount and awarded execution, sufficient. *Russell* vs. *Lillja*, 90 Ill. 327.

More formal allegations necessary as to destruction of record in pending suit than where judgment has been obtained. *Russell* vs. *Lillja*. 90 Ill. 327.

Limitation applies to cases determined in appellate court as well as to those which may be taken from circuit to supreme court. *McClure* vs. *Walker*, 103 Ill. 544.

Proceedings on petition stated. *Miller* vs. *Shaw*, 103 Ill. 277.

Petitioner need not be in possession. *Heacock* vs. *Lubuke*, 107 Ill. 396.

Above cited. *Smith* vs. *Hutchinson*, 108 Ill. 662.

Jury trial not contemplated by the statute, nor is it indispensable to the relief in view. *Colver* vs. *Colehour*, 115 Ill. 558, following similar cases of *In re Ferrier*, 103 Ill. 367; *Ward* vs. *Farwell*, 97 Ill. 593; *Heacock* vs. *Hosmer*, 109 Ill. 245.

Petition *held* to contain all that statute requires. *Heacock* vs. *Hosmer*, 109 Ill. 245.

If it is sought to have tax deeds set aside as clouds, petition should set out the defects in such deeds and in the proceedings on which such deeds are based. *Gage* vs. *McLaughlin*, 101 Ill. 155.

The two years' limitation in Section 5057, Revised Statutes of the United States, will be a bar to a suit by the grantee of an assignee in bankruptcy, in so far as the bill seeks to have the tax title set aside. Where the mere restoration of the records alone is sought, the limitation of the Bankrupt act can have no application. *Gage* vs. *Du Puy*, 127 Ill. 216.

It is objected that the petition is insufficient to warrant the court in finding the tax deeds void, for the reason that it does not aver the invalidity of such tax deeds, as is required to be done in bills to remove tax deeds as clouds upon titles, and proof thereof was not made by the petitioner. The position is untenable. All that is required in respect of adverse claimants or their titles is that such claimant shall be named in the petition and made defendant. Nothing more is required to give the court jurisdiction, under the statute, to investigate all claims

SECTION 16.

Jurisdiction.

Court may examine all interest in title and determine it by decree as to all persons known or unknown. *Mulvey* vs. *Gibbons*, 87 Ill. 367.

Under the statute, court is authorized to decree in favor of better title. *Robinson* vs. *Ferguson*, 78 Ill. 538; *Covington* vs. *East St. Louis*, 78 Ill. 538.

Chain of canceled mortgages will not be restored. *Strong* vs. *Shea*, 83 Ill. 575.

Cited. *Mulvey* vs. *Gibbons*, 87 Ill. 367.

Petitioner may not only establish his own title in this proceeding, but may make holder of tax title defendant, and have such tax title set aside as cloud. *Smith* vs. *Gage*, 11 Biss. 217.

Jurisdiction of courts of equity is enlarged to include suits brought under the Burnt-Records act. *Gage* vs. *Du Puy*, 127 Ill. 216.

Court will consider validity of tax title and set aside same upon proper terms in burnt-record proceedings. *Smith* vs. *Gage*, 12 F. R. 32.

In collateral suit (e. g., action of ejectment) title *held* established by decree under this section. *Bradish* vs. *Grant*, 119 Ill. 606.

It is no objection to proceeding under this statute, where the facts alleged and proved bring the case within its provisions, that there are adverse claimants. Whatever may be the power of a court of chancery, where there are controverted titles, to restore by its decree the evidence of title in the respective parties as they were before the destruction of the record, and then in its discretion remit the parties to a court of law to try their titles, it is manifest no such course was contemplated by the statute or necessary in cases under it. *Gage* vs. *Caraher*, 125 Ill. 447.

Admission by one of the defendants as to petitioner's title at the time of the destruction of the records will not prevent the court from taking jurisdiction under this act. *Harding* vs. *Fuller*, 141 Ill. 308 (1892).

Destruction of the records is the fact which authorizes a court of chancery to inquire into the conditions of the title. *Harding* vs. *Fuller*, 141 Ill. 308 (1892).

Power to give possession results from the jurisdiction exercised and the decree. *Harding* vs. *Fuller*, 141 Ill. 308 (1892).

Under this section the court has power to decree who holds title to the land in controversy. *Gage* vs. *Harbert*, 145 Ill. 530 (1892).

The court has power to issue a writ of assistance to put the petitioner into possession of the land which he claims and to which he has proved title. *Gormley* vs. *Clark*, 134 U. S. 338 (1890); *Harding* vs. *Fuller*, 141 Ill. 308 (1892).

General.

Decree can be opened only within twelve months after its rendition. *Bertrand* vs. *Taylor,* 87 Ill. 235.

Reference to the Revised Statutes of 1845, Chapter XXI, Section 15, relates only to proceedings on answer, and to extent and effect of opening. *Bertrand* vs. *Taylor,* 87 Ill. 235.

Provision that decree against married women, etc., shall set forth evidence is applicable only to cases in which decree is based on evidence, not to case where allegations of petition are admitted by demurrer or other admissions of parties. *Heacock* vs. *Hosmer,* 109 Ill. 245.

Requirement that the petitioner himself be in possession would be inconsistent with this section. *Harding* vs. *Fuller,* 141 Ill. 308 (1892).

Decree should show, not what the records showed before they were destroyed, but in whom the title is vested at the time when the decree is rendered. *Gage* vs. *Gentzel,* 144 Ill. 450 (1893).

A record of a deed is, in general, constructive notice of its contents, although the record has been destroyed, but such record does not prevail over the decree of a competent court; and when a lawful decree has been subsequently rendered, incorrectly declaring the contents of the deed, the destroyed record ceases to be constructive notice of those terms which are incorrectly declared. *Franklin Savings Bank* vs. *Taylor,* 9 U. S. App. 406 (1893); S. C., 53 F. R. 854 (1893), reversing *Taylor* vs. *Franklin Savings Bank,* 50 F. R. 289 (1891).

Section 18.

Provides rule of evidence merely. Is not unconstitutional as impairing obligation of contracts. So though the charter of Chicago gave deeds and certificates such effect. *Roby* vs. *Chicago,* 64 Ill. 447.

This section does not apply to party defending under tax title acquired before passage of act. *Garrick* vs. *Chamberlain,* 97 Ill. 620.

Where petitioner, to confirm title under this act, shows valid title, defendant claiming by tax title has burden of proof hereunder. *Chamberlain* vs. *Sutherland,* 4 Ill. App. 494.

In a proceeding under the Burnt-Records act, to confirm the title to land as against tax titles, the petitioner will be required to repay the money advanced at the tax sale, and subsequent taxes paid by the holder of such titles, with the legal interest thereon. This rule is based on the maxim "that he who seeks equity must do equity." *Gage* vs. *Caraher,* 125 Ill. 447.

The statute creating the presumption in favor of the regularity of proceedings for the sale of land for taxes, prior to the deed, as it establishes only a rule of evidence, may be changed, and a change in the statute doing away with the presumption, and throwing the burden of proof on the party holding a tax title to show the irregularity of the proceeding, is not unconstitutional, as impairing the obligation of contracts. *Gage* vs. *Caraher*, 125 Ill. 447.

Where a purchaser at a sale upon a special assessment omits to take out his deed within the time limited by statute, and therefore the tax certificate and the sale on which it was based has ceased to be a cloud on the title to the property to which such certificates refers, the petitioner seeking confirmation of his own title will not be required to reimburse the holder of such certificate for the money advanced by him at the assessment sale. *Gage* vs. *Caraher*, 125 Ill. 447.

Section 20.

Maximum fees which officers and employees may charge or be allowed for services are only fixed, and this section does not limit the costs in the case to two thirds of the ordinary costs at law. *Rogers* vs. *Tyley*, 144 Ill. 652 (1892).

Section 22.

The rules and regulations of courts of chancery apply to the proceedings under this act. *Gage* vs. *Du Puy*, 127 Ill. 216.

Statute cited. *Harms* vs. *Jacobs*, 155 Ill. 221 (1895).

Section 23.

Index of records admissible as secondary evidence at common law where record is destroyed. *Alvis* vs. *Morrison*, 63 Ill. 181.

Objections to abstracts offered in evidence hereunder, as offered before proof of conditions necessary to admissibility, must be made at trial. *Carbine* vs. *Pringle*, 90 Ill. 302.

Under statute, neither letter-press copy of abstract of title, nor copy of such letter-press copy, is admissible in evidence. *Compton* vs. *Randolph*, 104 Ill. 555; *King* vs. *Worthington*, 73 Ill. 161.

The recollection of a witness as to the contents of lost or destroyed instruments would clearly be competent under this section, and there is no reason why their recollection might not be refreshed by reference to notes taken by the witnesses, and known to be correct. *Bush* vs. *Stanley*, 122 Ill. 406.

Abstract of deed recorded, though deed be defectively acknowledged, may be introduced in evidence and relied on in proof of title. *Heinsen* vs. *Lamb*, 117 Ill. 549.

Abstract of title, or copies, extracts or minutes of the same, may be used in evidence. *Converse* vs. *Ward*, 142 Ill. 132 (1892).

Particular deeds alleged to be lost do not prevent the introduction of such deeds in evidence, as they may have been found subsequent to filing the bill. *Gage* vs. *Gentzel*, 144 Ill. 450 (1893).

There is no presumption that defendants in an ejectment suit were in actual possession in 1871, but such possession, if it exists, is a matter of defense to be shown by the defendant. *Chicago, etc. R. Co.* vs. *Keegan*, 152 Ill. 413 (1894).

A sworn answer in a suit under the Burnt-Records act is not evidence as in an ordinary chancery suit, but has no other or greater weight as evidence than the petition. *Miller* vs. *Stalker*, 158 Ill. 514 (1895).

Section 24.

An abstract of title admitted in evidence. *Russell* vs. *Mandell*, 73 Ill. 136; *Miller* vs. *Shaw*, 103 Ill. 277.

Abstract of title, made years before by abstracters in course of business, presumed made for owners or purchasers, and admitted. *Richley* vs. *Farrell*, 69 Ill. 264.

Abstract of title is secondary, not original, evidence, and if lost its contents can not be proved by other evidence. *Thatcher* vs. *Olmstead*, 110 Ill. 26.

Abstract of titles is summary of facts relied on as evidence of title. It must contain notes of all conveyances, transfers or other facts relied on as evidences of claimant's title, together with all such facts appearing of record as may impair it. *Heinsen* vs. *Lamb*, 117 Ill. 549.

Case *held* proper for admission of ante-fire abstract, and abstract offered *held* admissible. Abstract made from minutes taken from record, *held* an original, not a copy. *Heinsen* vs. *Lamb*, 117 Ill. 459.

A sworn copy of minutes admissible under this section is properly entitled to be used as evidence by complainant, on proof that such sworn copy was delivered to counsel for defendant at noon on the day before trial and left in his possession until four o'clock of same day, in order that he might verify the correctness of such copy. *Sternheim* vs. *Burchy*, 149 Ill. 241 (1894).

Where loss or destruction of the original deeds and the record thereof has been shown, extracts and minutes made from original deeds on the day they were filed for record, by a firm who were in the business of making abstracts, which minutes were made in the regular course of business and were in possession of such firm when the records were destroyed, are entitled to be read in evidence. *Sternheim* vs. *Bruchy*, 149 Ill. 241 (1894).

Under the conditions imposed by this section, resort may be had to evidence of a twofold character: First, an abstract of title made in the ordinary course of business prior to such loss or destruction or a letter-press copy thereof; second, any copy, extract or minutes from such destroyed records or from the originals of such, which were at the date of such loss in the possession of any person then engaged in the business of making abstracts of title for hire. *Sternheim* vs. *Burchy*, 149 Ill. 241 (1894).

Where it is not proved that the abstracts offered by virtue of this act were made in the ordinary course of business, and prior to the destruction of the originals, they are not admissible, and the burden is on the party offering the abstracts to bring them within the terms of the statute. *Chicago, etc. R. Co.* vs. *Keegan*, 152 Ill. 413 (1894).

To entitle one to introduce an abstract in evidence under the Burnt-Records act, it is not necessary that any witness should testify from personal knowledge that such abstract was made in the ordinary course of business, prior to the loss of original. *Chicago, etc. R. Co.* vs. *Keegan*, 152 Ill. 413 (1894).

An Act to provide for the copying of old or damaged public record books.

[Approved March 26, 1872; in force July 1, 1872.]

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That whenever any record book of deeds, mortgages, or other instruments, or any order book, docket, or fee book, records of wills or records of settlements of administrators, executors or guardians, or any other book belonging to any county, which is required by law to be preserved in any public office of the county, for the use or inspection of the public, shall be so much worn, decayed, mutilated, or otherwise damaged, as to endanger the preservation of the records contained in any such book, it shall be lawful for the board of county commissioners or board of supervisors to cause any such book to be copied and transcribed into a new and well-bound book, to be furnished as other record books are furnished.

SEC. 2. Said book or books, when so copied and transcribed, shall be carefully compared with the original book or books from which they were copied, by the persons who shall have done the work, together with some other discreet and skillful person, and when said books are so copied and compared with the originals the persons who have made such examination shall make an affidavit, which shall be incorporated

in the book as copied, that said book, and each and every part thereof, is a true copy of the original book and each and every part thereof, that the matter of record which appears upon any page of the original appears also upon the same page of the copy, and that no matter of record appears upon any page of the copy which is not to be found upon the same page of the original.

SEC. 3. Any such new book into which said affidavit has been incorporated shall be, in all courts and places, as effectual for any and every purpose as the original record book, and it shall bear the same name or designation, and certified copies of any instrument copied into it shall have the force and effect of certified copies of the original made from the original book.

SEC. 4. The board of county commissioners, or board of supervisors, may allow such compensation for copying and transcribing records under this act, to be paid out of the county treasury, as to them may seem reasonable, not exceeding the amount now authorized to be received for recording deeds and mortgages.

SEC. 5. In all cases where it is necessary, in any county not under township organization, to transcribe or copy any books contemplated by this act, before a board of county commissioners is elected in such county, the county court of such county shall have power to cause the same to be done under the provisions of this act.

An Act to provide for re-recording deeds, mortgages, and other instruments in writing, where the original records thereof have been destroyed, and to fix the fee for such re-recording.

[Approved and in force March 1, 1873.]

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That in all cases where the records of any county have been or shall hereafter be destroyed by fire or other casualty, it shall be the duty of the recorder of deeds of such county to re-record all deeds, mortgages or other instruments in writing, which may have been recorded or filed for record prior to the destruction of such records, together with the certificates of such original recording, that may be filed in his office for re-recording. And said recorder of deeds may charge and receive as a fee, for re-recording such deeds, mortgages, and other instruments aforesaid, and the certificate of such recording, five cents for each hundred words or fraction thereof, and

no more. And any recorder of deeds who shall charge a greater fee than the foregoing, or who shall refuse to re-record such instruments in writing, aforesaid, for the fee aforesaid, shall be deemed guilty of malfeasance in office, and subject to all the penalties prescribed by law for such offense.

SEC. 2. That whereas the records of Cook County have recently been destroyed by fire, and many such instruments of writing are daily being filed for record, and the fee for re-recording the same has not been filed by law, therefore an emergency exists, requiring immediate legislation on the subject, therefore, this act shall take effect and be in force from and after its passage.

FEDERAL BURNT-RECORD ACTS.

R. S. U. S. § 899. *When original records are lost or destroed.*

When the record of any judgment, decree, or other proceeding of any court of the United States is lost or destroyed, any party or person interested therein may, on application to such court, and on showing to its satisfaction that the same was lost or destroyed without his fault, obtain from it an order authorizing such defect to be supplied by a duly certified copy of the original record, where the same can be obtained; and such certified copy shall thereafter have, in all respects, the same effect as the original record would have had. [Act of March 3, 1871, ch. 111, 16 Stat. L. 474.]

§ 900. *Same subject.*

When any such record is lost or destroyed, and the defect can not be supplied as provided in the preceding section, any party or person interested therein may make a written application to the court to which the record belonged, verified by affidavit, showing such loss or destruction; that the same occurred without his fault or neglect; that certified copies of such record can not be obtained by him; and showing also the substance of the record so lost or destroyed, and that the loss or destruction thereof, unless supplied, will or may result in damage to him. The court shall cause said application to be entered of record, and a copy of it shall be served personally upon every person interested therein, together with written notice that on a day therein stated, which shall not be less than sixty days after such service, said application will be heard; and if, upon such hearing, the court is satisfied that the statements contained in the application are true, it shall make and cause to be entered of record an order reciting the substance and effect of said lost or destroyed record. Said order shall have the same effect, so far as concerns the party or person making such application and the person served as above provided, but subject to intervening rights, which the original record would have had, if the same had not been lost or destroyed. [Act of March 3, 1871, ch. 111, 16 Stat. L. 475.]

§ 901. *Same subject.*

When any cause has been removed to the supreme court, and the original record thereof is afterward lost, a duly certified copy of the record remaining in said court may be filed in the court from which